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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

No. 173.

THE UNITED STATES FIDELITY AND GUARANTY COMPANY, PLAINTIFF IN ERROR,

vs.

THE UNITED STATES OF AMERICA, SUING FOR THE BENEFIT OF JAMES S. KENYON, DOING BUSINESS AS BURROWS & KENYON.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF RHODE ISLAND.

FILED DECEMBER 26, 1905.

(20,024.)

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1 *Writ of Error.*

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Honorable the Judges of the Circuit Court of the United States for the District of Rhode Island, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Circuit Court, before you, or some of you, between The United States of America suing for the benefit of James S. Kenyon of the City and County of Providence and State of Rhode Island, doing business as Burrows & Kenyon plaintiff, and Joseph J. Churchyard of the City of Buffalo State of New York, and the United States Fidelity & Guaranty Co. a corporation created under the laws of the State of Maryland, defendants a manifest error hath happened, to the great damage of the said The United States Fidelity and Guaranty Company defendant as by its complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Supreme Court, together with this writ, so that you have the same at the city of Washington, D. C., on the* 30th day of December next, in the said Supreme Court, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 4th day of December, in the year of our Lord one thousand nine hundred and five.

[Seal Circuit Court, Rhode Island.]

WILLIAM P. CROSS,
Clerk of the Circuit Court of the United States,
District of Rhode Island.

Allowed by
ARTHUR L. BROWN,
United States District Judge.

*Not exceeding 30 days from the day of signing the citation. Rule 14, Sec. 5.

2 *Return of Circuit Court on Writ of Error.*

CIRCUIT COURT OF THE UNITED STATES,
District of Rhode Island, ss:

And now, here, the Judges of the Circuit Court of the United States, in and for the District of Rhode Island, make return of this writ by annexing hereto and sending herewith, under the seal of the said Circuit Court, a true and attested copy of the record and proceedings in the suit within mentioned, with all things concerning the same, to the United States Supreme Court, as within commanded.

In Testimony Whereof, I William P. Cross Clerk of said Circuit Court of the United States, in and for the District of Rhode Island, have hereto set my hand and the seal of said Court this 19 day of December A. D. 1905.

[Seal Circuit Court, Rhode Island.]

WILLIAM P. CROSS, *Clerk.*

3 *Transcript of Record of Circuit Court.*

UNITED STATES OF AMERICA, *District of Rhode Island:*

At a Circuit Court of the United States, begun and holden at Providence within and for the District of Rhode Island, on the fifteenth day of November, in the year of our Lord, one thousand nine hundred and five.

Present: The Honorable Arthur L. Brown, District Judge.

Law. 2713.

UNITED STATES OF AMERICA, Plaintiff,
vs.
JOSEPH J. CHURCHYARD and THE UNITED STATES FIDELITY AND GUARANTY COMPANY, Defendants.

The Writ and Declaration in this action were filed in the clerk's office of this court, to wit: on June 23, 1903, and are in the words and figures following, viz:

Writ.

(Filed June 23, 1903.)

[L. S.] The President of the United States of America to the Marshal of the United States for the District of Rhode Island, or his Deputy, Greeting:

We command you to summon Joseph J. Churchyard of the City of Buffalo County of Erie and State of New York and the
4 United States Fidelity and Guaranty Company, a corporation created and existing under the laws of the State of Maryland

and doing business in the State of Rhode Island, to answer the complaint of the United States of America suing herein for the benefit of James S. Kenyon of the City and County of Providence and State of Rhode Island, doing business as Burrows & Kenyon, at our Circuit Court next to be holden at Providence, within and for said district on the 16th day of November now next ensuing in an action of debt on bond under seal and bearing date the 9th day of August A. D., 1899, as by declaration to be filed in court will be fully set forth; to the damage of the plaintiff as it says Five hundred dollars. Hereof fail not, and make true return of this writ with your doings thereon.

Witness, the Honorable Melville W. Fuller, our Chief Justice at said Providence, this 10th day of June in the year one thousand nine hundred and three.

WILLIAM P. CROSS, *Clerk.*

Marshal's Return to Writ.

UNITED STATES OF AMERICA, *District of Rhode Island:*

At Providence in said district this 18th day of June, 1903, I made service of this writ on the within named United States Fidelity and Guaranty Company by leaving a true and attested copy of the same in the hands and possession of Charles H. Beach, Agent of the aforesaid Fidelity and Guaranty Company, and attorney to receive for said company in said district.

RICHMOND J. STONE,
Deputy United States Marshal.

Fees: $2.30.

Declaration.

(Filed June 23, 1903.)

The United States of America, suing herein for the benefit of and on behalf of James S. Kenyon of the City and County of Providence and State of Rhode Island, doing business as Burrows & Kenyon, comes and complains of Joseph J. Churchyard of the City of Buffalo, County of Erie, in the State of New York, as principal, and The United States Fidelity and Guaranty Company a corporation created and existing under the laws of the State of Maryland, and doing business in the State of Rhode Island, as surety duly held to answer the said plaintiff in an action of debt. For that heretofore on the 29th day of June, A. D. 1899 the United States of America, by its certain officers and agents, entered into an agreement in writing with the said Joseph J. Churchyard to furnish labor, materials, tools and appliances to construct one Non Commission- Officers' Quarters at Fort Greble, Rhode Island.

And in consideration of the said agreement and as a condition precedent thereto, the said United States of America did require

and exact of the said Joseph J. Churchyard a certain bond in the sum of Five Hundred Dollars ($500.), conditioned, among
6 other things, the the said Joseph J. Churchyard shall promptly make payments to all persons supplying him or them with labor and materials in the prosecution of the work provided for in the said contract.

And thereupon the said The United States Fidelity and Guaranty Company, as surety, did make, execute and deliver, at Newport in the District of Rhode Island, and the said United States of America did accept the same as satisfactory to it on the 9th day of August, A. D. 1899, their certain bond or guaranty in the sum of Five Hundred Dollars ($500.) (and here ready to be shown to this court) wherein they acknowledge themselves to be jointly and severally bound to the United States of America in the said sum of Five Hundred Dollars ($500.), which bond, among other things, provided that if the said Joseph J. Churchyard his heirs, executors or administrators shall promptly make payments to all persons supplying him or them labor or materials in the prosecution of the work provided in said contract, then the said obligation shall be void and of no effect; otherwise to remain in full force and virtue.

That the said Joseph J. Churchyard thereupon entered upon the performance of the said contract and ordered of the said James S. Kenyon, doing business as aforesaid, large amounts of materials to be used in and for the construction of the Non Commission- Officers' Quarters referred to in said contract and then and there promised to promptly pay for the same. Whereupon the said James S.
7 Kenyon doing business as aforesaid, furnished to the said Joseph J. Churchyard said materials, but the said Joseph J. Churchyard, although often requested, has not made prompt payment for the same.

That in consideration of the materials furnished by the said James S. Kenyon, doing business as aforesaid, and the non payment of the same as aforesaid, said defendants became and are indebted to the said United States of America for the benefit of the said James S. Kenyon, doing business as aforesaid, in the sum of Sixty Six Dollars and Five Cents ($66.05), which said sum, so due and owing to him, the said defendants or either of them have not paid, but have totally neglected and refused to pay the same.

Wherefore, in and by the statute in such cases made and provided and of law, the right hath accrued to the said plaintiff to bring its said action to recover and receive of said defendants the said sum of money so due and owing, which though of said defendants often requested, they have utterly refused and neglected, and do refuse and neglect to pay.

To the damage of the said plaintiff Five Hundred Dollars ($500.) as laid in its said writ bearing date the 10th day of June, A. D. 1903.

EDWARD D. BASSETT,
Plaintiff's Attorney.

8 Thereafter there was filed, to-wit, on March 24, 1904, the following

Plea of Defendant The United States Fidelity and Guaranty Company.

(Filed March 24, 1904.)

The said defendant The United States Fidelity and Guaranty Company comes and defends the wrong and injury when, etc., and says it does not owe said sum of money above demanded or any part thereof in the manner and form as the said plaintiff hath above complained.

And of this the said defendant The United States Fidelity and Guaranty Company puts itself upon the country.

By Its Attorney, JAMES E. SMITH.

To which plea the plaintiff, to-wit, on May 9, 1904, filed the following

Replication.

(Filed May 9, 1904.)

First. The said plaintiff as to the plea of the said defendant the United States Fidelity & Guaranty Company, by it first above pleaded and whereof it hath put itself upon the country, doeth the like.

By Its Attorney, E. D. BASSETT.

6 On May 26, 1904, the defendant The United States Fidelity and Guaranty Company filed the following,

Motion to Dismiss for Want of Jurisdiction.

(Filed May 26, 1904.)

The defendant, the United States Fidelity & Guaranty Company, comes and moves that the above entitled action be dismissed for want of jurisdiction.

By Its Attorneys, JAMES E. SMITH,
EDWARDS & ANGELL.

The cause came on for hearing, to-wit, on the said 26th day of May, 1904, the Honorable Arthur L. Brown, District Judge, being present and presiding, on the foregoing motion to dismiss and was fully argued by counsel for the respective parties, the decision of the court was announced on the 17th day of August, 1904, and the motion to dismiss was denied and dismissed.

Thereafter, to wit, on November 15, 1905, the case came on for hearing on issues of fact before the Honorable Arthur L. Brown, District Judge, jury trial being waived in writing, testimony for

plaintiff submitted, defendant submits no testimony but moves to dismiss for want of jurisdiction and motion is denied, exceptions taken and allowed, and the court finds generally for the plaintiff and assesses damages at Two Hundred and six dollars and forty-seven cents.

10 Thereafter, to wit, on November 27, 1905, there was presented by the defendant, the United States Fidelity & Guaranty Company the following

Bill of Exceptions.

(Allowed, November 27, 1905.)

Be it understood that on the hearing of this cause in this court, at the November Term, A. D. 1905, of said Court, the Hon. Arthur L. Brown, Judge, presiding, when the following proceedings were had, to-wit:—Said cause came on for hearing, jury trial being waived in writing by the parties, and thereupon at the close of the evidence in chief offered by the plaintiff, the counsel for the defendant moved the Court to dismiss said action on the ground that the Circuit Court of the United States had no jurisdiction to entertain said action which is an action in the name of the United States, for the use and benefit of a person supplying labor and materials for public buildings, upon a certified copy of a bond given under the provisions of an Act of Congress of August 13, 1894, Chap. 280, Sec. 1, 28 Stat. 278, entitled "An Act for the Protection of Persons Furnishing Material and Labor for the Construction of Public Works", the amount in dispute being less than two thousand dollars, which said motion to dismiss was denied, and thereupon, the defendant not offering any testimony on its part, judgment was entered for the plaintiff for the amount of its claim, to all of which the defendant excepted.

And now in furtherance of justice and that right may be done, the defendant, The United States Fidelity & Guaranty Com-
11 pany tenders and presents the foregoing as its bill of exceptions in this case to the action of the court, and prays that the same may be settled and allowed and signed and sealed by the court and made a part of the record and the same is accordingly done this 27th day of November, 1905.

Presented within extended time and allowed the 27th day of November, 1905.

ARTHUR L. BROWN, *J.*

The foregoing Bill of Exceptions being allowed by direction of the Hon. Arthur L. Brown, District Judge and in accordance with finding of the court heretofore made there is entered this 27th day of November, 1905, the following

Judgment.

(Entered November 27, 1905.)

It is considered by the Court that the defendant The United States Fidelity and Guaranty Company is indebted to the plaintiff in the sum of Five Hundred Dollars, and the plaintiff having proved damages to the amount of Two Hundred and Six and 47/100 Dollars,

It is further considered by the Court that the plaintiff have and recover of the said defendant, The United States Fidelity and Guaranty Company for the use and benefit of said James S. Kenyon, doing business as Burrows and Kenyon the sum of Two Hundred and Six and 47/100 Dollars, and costs taxed at Twenty-six and 20/100 Dollars.

12 Thereafter, to-wit, on November 29, 1905, the defendant, the said The United States Fidelity and Gauranty Company filed a Petition for Writ of Error, Assignment of Errors and Bond to Party on Writ of Error, and the said bond is approved and writ of error allowed, to wit, on December 4, 1905.

Petition for Writ of Error.

(Filed November 29, 1905.)

And now comes the United States Fidelity & Guaranty Company, plaintiff herein, and says:

That on the 27th day of November, A. D., 1905, the Circuit Court of the United States, for the District of Rhode Island, entered a judgment in the above entitled action in favor of the plaintiff and against the defendant, in which judgment and the proceedings had prior thereto in this cause, certain errors were committed to the prejudice of the plaintiff herein, all of which will more in detail appear from the assignment of errors which is filed with this petition.

Wherefore, this plaintiff prays that a writ of error may issue in this behalf out of the Supreme Court of the United States for the correction of errors so complained of, and that a transcript of the record, proceedings and papers in this cause, duly authenticated, may be sent to the Supreme Court of the United States.

THE UNITED STATES FIDELITY & GUARANTY COMPANY,
By Its Attorneys, JAMES E. SMITH,
EDWARDS & ANGELL.

13 *Assignment of Errors.*

(Filed November 29, 1905.)

The plaintiff in error in connection with its petition for a writ of error makes the following assignment of errors which it avers occurred upon the hearing of said cause, to wit,

First. The Court erred in refusing to grant the motion of the plaintiff in error to dismiss said action for lack of jurisdiction.

Second. The Court erred in holding that the Circuit Court of the United States has jurisdiction to entertain an action in the name of the United States, for the use and benefit of a person supplying labor and materials for public buildings, upon a certified copy of a bond given under the provisions of an Act of Congress of August 13, 1894, Chap. 280, Sec. 1, 28 Stat. 278, entitled, "An Act for the Protection of Persons Furnishing Material and Labor for the Construction of Public Works", wherein the amount in dispute was less than two thousand dollars.

Wherefore, the plaintiff in error prays that the judgment of said Circuit Court may be reversed.

THE UNITED STATES FIDELITY & GUARANTY COMPANY,
By Its Attorneys, JAMES E. SMITH,
EDWARDS & ANGELL.

14 *Bond to Party on Writ of Error.*

(Approved December 4, 1905.)

Know all men by these presents, That we, The United States Fidelity & Guaranty Company, a corporation incorporated under the laws of the State of Maryland, as principal, and Fidelity & Deposit Company of Maryland, a corporation incorporated under the laws of said state of Maryland, as surety, are held and firmly bound unto United States of America in the full and just sum of five hundred dollars ($500.) to be paid to the said United States of America, its certain attorneys or assigns; to which payment, well and truly to be made, we bind ourselves, and our respective successors, jointly and severally, by these presents.

Sealed with our seals and dated this 16th day of November in the year of our Lord one thousand nine hundred and five.

Whereas, lately at a Circuit Court of the United States for the District of Rhode Island in a suit depending in said Court, between United States of America for the use of James S. Kenyon, doing business as Burrows and Kenyon, plaintiff and The United States Fidelity & Guaranty Company, defendant judgment was rendered against the said The United States Fidelity & Guaranty Company and the said The United States Fidelity & Guaranty Company having obtained a writ of error and filed a copy thereof in the Clerk's Office of the said Court to reverse the judgment in the aforesaid suit, and a citation directed to the said United States of America and James S. Kenyon citing and admonishing them to be
15 and appear in the Supreme Court of the United States in the City of Washington, in the District of Columbia, on the 30th day of December 1905.

Now, the condition of the above obligation is such, That if the said The United States Fidelity & Guaranty Company shall prosecute

its writ of error to effect, and answer all damages and costs if it fails to make its plea good, then the above obligation to be void; else to remain in full force and virtue.

[L. S.] THE UNITED STATES FIDELITY & GUARANTY COMPANY,
RICH'D D. LANG, *Vice-Pres.*
ALBERT H. BUCK, *Ass't Sec'y.*

[L. S.] FIDELITY & DEPOSIT COMPANY OF MARYLAND,
By THOS. A. WHELAN, *Vice-Pres.*

Attest: THOS. L. BERRY, *Ass't Sec'y.*

Approved: December 4, 1905.
ARTHUR L. BROWN,
United States District Judge.

Order Allowing Writ of Error.

(Entered December 4, 1905.)

This 4th day of December, A. D., 1905, comes the plaintiff in error, by its attorneys, and files herein and presents to the court, its petition, praying for the allowance of a writ of error and an assignment of errors intended to be urged by it, praying also that a transcript of the record and proceedings and papers upon which the judgment herein was rendered, duly authenticated, may
16 be sent to the Supreme Court of the United States, and that such other and further proceedings may be had as are proper in the premises.

On consideration whereof, the court does allow the writ of error upon the plaintiff in error giving bond according to law in the sum of five hundred dollars ($500.), which shall operate as a supersedeas bond.

By the Court, Brown J., December 4, 1905.
WILLIAM P. CROSS, *Clerk.*

Certificate of Jurisdictional Question by Trial Judge.

This is an action of debt upon a bond given to the United States by a contractor under the provisions of the Act of Congress of August 13, 1894, Chapter 280, Sec. 1, 28 Stat. 278, entitled, "An Act for the Protection of Persons Furnishing Material and Labor for the Construction of Public Works", wherein the amount involved is less than two thousand dollars. The United States Fidelity & Guaranty Company, defendant, filed its motion in writing to dismiss the action for lack of jurisdiction.

This motion was denied and exception taken to the ruling of the Court thereon, which said exception was duly allowed, and

thereafter on the 27th day of November, A. D. 1905, judgment was entered for the plaintiff.

I certify that the judisdictional question raised in this case is:—

Does the Circuit Court of the United States have jurisdiction
17 to entertain an action in the name of the United States, for the use and benefit of a person supplying labor and materials for public buildings or work, upon a certified copy of a bond given under the provisions of the Act of Congress of August 13, 1894, Chap. 280, Sec. 1, 28 Stat. 278, entitled, "An Act for the Protection of Persons Furnishing Material and Labor for the Construction of Public Works", wherein the amount involved is less than two thousand dollars?

This certificate is made conformably to Act of Congress of March 3, 1891, Chap. 517, and the opinion filed herein is made a part of the record and will be certified and sent up as part of the proceedings, together with this certificate.

This 4th day of December, A. D., 1905.

ARTHUR L. BROWN,
District Judge Holding the Circuit Court of the United States for the District of Rhode Island.

Opinion of the Court on Motion to Dismiss for Lack of Jurisdiction.

(August 17, 1904.)

BROWN, *J.:*

These actions of debt are brought in the name of the United States on bonds given by Churchyard, a contractor. In each case, the beneficial or use plaintiff is a person who furnished labor or
18 materials of less than two thousand dollars in value for public works of the United States. The plaintiffs rely upon the Act of Congress of August 13, 1894, Chap. 280, § 1, 28 Stat. 278, entitled, "An Act for the protection of persons furnishing materials and labor for the construction of public works." Churchyard's bond to the United States conformed to that act. A breach of the condition "to promptly make payments to all persons supplying him with labor and material in the prosecution of the work" is assigned.

Unless this is a controversy "in which the United States are plaintiffs", or unless the said act confers jurisdiction where the amount is less than two thousand dollars, the motions to dismiss must be granted, for all other statutory provisions are coupled with the requirement of a jurisdictional amount larger than is involved in any one of these cases.

The defendants rely chiefly upon the decisions in United States *v.* Henderlong, 102 F. R. 2, and United States *v.* Sheridan, 119 F. R. 236. In the first case it was held that:

"The United States are neither the legal nor equitable plaintiffs in the present action, They are seeking no remedy for any injury to, or for the withholding of, any of their rights; nor have they any equitable right to or interest in the thing sued for. They have neither the legal right of action, nor any equitable interest

in the matter in controvercy. The United States are simply a formal or model party,—a mere name, used for convenience only."

It was also stated:

"No reason is perceived why the courts of the United States should take cognizance of the suits of laborers and material men, unless the citizenship of the parties, and the amount involved in the controversy, are such as would give jurisdiction as in the case of other suitors. These views find support in the decisions of the Supreme Court in Browne *v.* Strode, 5 Cranch, 303; McNutt *v.* Bland, 2 How. 9; Walden *v.* Skinner, 101 U. S. 577, 588, 589."

19 The action was dismissed for lack of jurisdiction.

In United States *v.* Sheridan, 119 F. R. 236, 239, it was said:

"But can it be maintained that congress, by permitting private litigants, under certain circumstances stated in the act, to use the name of the United States in their suits on the bond, intended thereby also to enlarge the jurisdiction of the federal courts by providing that the use of the name of the United States by such litigant should mean that such cases were to be included among those of which federal courts were given jurisdiction, upon the ground that the 'United States sued as plaintiff' within the meaning of the judiciary act, when in fact the United States did not, in any essential sense, sue at all, and had no kind of legal interest in the claim asserted by the real party to wit, the material man? It seems to me not."

It was held that, in order to maintain jurisdiction in a case of this character, the amount claimed, exclusive of interest and costs, should exceed the sum of two thousand dollars.

There are many decisions of the Supreme Court to the effect that, in determining whether a case is truly a controversy between citizens of different states, the substantial rather than the formal parties should be regarded. In Stewart *v.* Baltimore & Ohio R'y Co. 168 U. S. 445, it was said:

"For the purposes of jurisdiction in the federal courts, regard is had to the real rather than to the nominal party."

United States *v.* Bebee, 127 U. S. 338, is also an illustration of this principle. In that case, it was held that the Attorney General has authority to file a bill in equity in the name of the United States to set aside a patent of public land alleged to have been obtained by fraud or mistake, where the Government has a direct interest in the tract patented, or is under an obligation respecting the relief invoked by the bill. But the court also said (p. 346):

"An inspection of the record shows that the Government, though in name the complainant, is not the real contesting party to the title or property in the land in controversy. It has no interest in
20 the suit, and has nothing to gain from the relief prayed for, and nothing to lose if relief is denied."

For this reason, though jurisdiction was retained, it was held that the complainants could not invoke the rule that the United States are not bound by statutes of limitations, nor barred by laches.

In United States *v.* Bell Telephone Co., 167 U. S. 224, it was said: (264, 265)

"Suits may be maintained by the Government in its own courts to set aside one of its patents not only when it has a proprietary and pecuniary interest in the result, but also when it is necessary in order to enable it to discharge its obligations to the public, and sometimes when the purpose and effect are simply to enforce the rights of an individual. * * *

"Now, in the case at bar the United States has no proprietary or pecuniary interest. The result, if favorable to it, would put no money in its treasury or property in its possession. It has a standing in court either in the discharge of its obligation to protect the public against a monopoly it has wrongfully created, or simply because it owes a duty to other patentees to secure to them the full enjoyment of the rights which it has conferred by its patents to them. Perhaps both of these objects were in view. In so far as the latter was and is the purpose of this suit it brings it within the rule laid down in United States *v.* Bebee, *supra.*"

From these and other decisions, it is apparent that the question whether the United States is a party is not dependent merely upon pecuniary interest. See also, *In re* Debs, 158 U. S. 584, 586. What is the nature of the interest of the United States in the actions provided for by the act? In United States *v.* Sheridan, 119 F. R. 236, 239, it was said:

"It is true that the act of August 13, 1894, was enacted for beneficial purposes, and possibly those benefits to a certain extent may extend to the United States in making more certain and prompt the obtaining of materials and labor by contractors upon public works who have given the bond with surety upon which outside parties can rely; but it is apparent that those benefits to the United States are quite incidental, if not speculative. The real purpose of the legislation was obviously to provide a guaranty of payment to laborers and material men through the medium of the bond
21 required, inasmuch as they could not, without permission of the government, acquire any lien upon works of public improvement."

The probable object of the act of Congress was to provide an equivalent, or substitute, for the familiar legislation for the protection of laborers and materialmen. See Standard Oil Co. *v.* Trust Co., 21 App. Cases, Dist. of Columbia, 269, 275. The general nature of this kind of legislation is set forth in the able opinion of Judge Lurton in Jones *v.* Great Southern Fireproof Hotel Co., 86 F. R. 370, 383, cited with approval in Great Southern Fireproof Hotel Co. *v.* Jones, 193 U. S. 532, 549, 550.

The justification for legislation by Congress upon this subject must be that, as a builder of public works, it is entitled to provide that those persons who incorporate their labor and materials into public works shall receive protection. It hardly can be doubted that Congress might have provided for a contract between the Government and the contractor for public works which should give to the Government the right to withhold the contract price until the satisfaction

of claims for labor and material, or permit the United States to pay directly the laborers and materialmen in case of default by the contractor. Redfield *v.* Windom, 137 U. S. 636. Provisions of this general character must be regarded as sanctioned "by the dictates of natural justice;" Great Southern Fireproof Hotel Co. *v.* Jones, 193 U. S. 532, 549. If it is competent for Congress to provide for such protection by requiring from the contractor a contract with the United States, and by permitting the laborer or materialman
22 to avail himself of this contract (as I assume, since the validity of the act is not questioned), is it not also competent for Congress to permit the laborer or materialman to avail himself of the status of the United States as a suitor in the United States courts, and to maintain suit irrespective of the amount involved, and is it not reasonable to suppose that this was the intent?

I cannot agree with the statement in United States *v.* Henderlong, *supra*, that the United States is not the legal plaintiff in this action. The contract is, in the strictest sense, a contract between the United States and the contractor for public works. The defendant has bound himself to the United States to the amount of the penal sum of the bond. The penalty is defeasible upon two conditions: first, that the contractor shall do his work; second, that he shall pay his laborers and materialmen. These are actions of debt, upon which ordinarily judgment is rendered for the penal sum, to be discharged upon payment of the amount of damages. Farin *v.* Terson, 1 Black, 309; 3 Am. & Eng. Enc. Pl. & Pr. 670. That laborers and materialmen are authorized to institute an action, does not alter the legal status of the contract, or change the legal parties to the contract. A failure to pay laborers and materialmen is a breach of an obligation to the United States assumed by the contractor under the requirement of an act of Congress.

It was the apparent intent of Congress to work out the protection of materialmen and laborers through a contract between the United States and the contractor. In determining the intent of Con-
23 gress, we should look rather to the act itself than to the particular pecuniary interest of the United States in the special case before us. It is apparent that the actions provided for by the act embrace both those that may pecuniarily affect the United States and those that may not. As ordinarily interpreted, the act requires the usual penal bond with a single penalty and two distinct conditions: first, to do the work; second, to pay laborers and materialmen.

In American Surety Co. *v.* Lawrenceville Cement Co., 96 F. R. 25, 26, Judge Putnam says:

"The United States, by the force of the statute which we have cited, voluntarily make themselves trustee, alike for their own interests and for the interests of the individuals intended to be protected; and having thus voluntarily created and accepted a trust, they are barred by equitable principles from asserting for themselves any advantage over other beneficiaries."

A suit instituted by a materialman may thus directly affect the security of the United States. Was it the intent of Congress to create new and unusual actions, and to permit a multitude of simultaneous

and independent suits to be instituted on bonds of this character; and to preclude the contractor and sureties from pleading, in bar of a second suit, a former judgment for the penal sum of the bond? The practical inconvenience of so construing this statute as to allow a large number of independent suits has been well illustrated in this circuit. See American Surety Co. *v.* United States, 123 F. R. 287; American Surety Co. *v.* Lawrenceville Cement Co., 96 F. R. 251, 110 F. R. 717, 913. On suits against a surety company, judgments were had greatly in excess of the amount of its liability on a bond.

24 The bond should not be regarded as containing an agreement between the obligors and third parties, but as a contract between the United States and the contractor, in which the United States has a double interest: first, a direct pecuniary interest; and second, an interest, as a constructor of public works, to protect those persons who incorporate their labor or materials into the works. Although a private person has the right to institute a suit, yet the bond is one for the protection of the United States and other persons as well, and a judgment upon the bond should accrue to the benefit of all in interest.

Because a privilege to institute a suit upon the contract is given to beneficiaries, it does not follow that the liability to suit of the obligors and sureties is thereby enlarged. The United States is the legal plaintiff, the basis of the action is a contract between the United States and a contractor, and the statute, in express terms, authorizes the suit to be brought in the name of the United States.

It is also urged by plaintiff's counsel that the provisions allowing suits to be brought on certified copies of the contract and bond, and for security for costs, &c., are applicable only to courts subject to congressional legislation; and, therefore, that it is apparent that the intent was to give all the privileges of a suit in the name of the United States except as expressly limited. The present cases are within the letter of the statute which gives jurisdiction to the United States courts, irrespective of the amount involved, when the United States is plaintiff. Is there any sufficient reason for denying

25 jurisdiction? Persons having the legal right may sue at law in the federal courts without regard to the citizenship of those having the equitable interest. Carter on Jurisdiction of Federal Courts, p. 139. The legal right is in the United States. It is true that the courts will "look to things, not names—to the actors in controversies and suits, not to the mere forms or inactive instruments used in conducting them in virtue of some positive law;" but it does not invariably follow that the rule shall be so applied as to break down the distinction between legal and equitable rights, or the distinction between legal and beneficial or use plaintiffs. Established forms of contract, forms of action, modes of procedure, are often matters of substance. When Congress, to work out a specific purpose, requires a contract with the United States, and authorizes a suit on that contract, we are not at liberty to say that this mode of effecting the object is all unreal, nominal, and unsubstantial. Even if the form established for working out the purpose were somewhat fictional in

character, we should hesitate to destroy the statutory machinery if we would thereby practically frustrate the purpose of the act or impair its value.

If suits of this character are to be limited to those involving more than two thousand dollars, this practically will cut off from the courts of the United States laborers and small materialmen. If they resort to a state court, they may meet the objection that their suit is brought upon a copy of the bond, and not upon the original, and that the modes of procedure of state courts are not subject to congressional legislation. Should a laborer bring suit in a state court and secure judgment, the United States, upon subsequently
26 suing in a United States court upon this bond for a breach of the obligation to construct the works, may be met by a plea of former judgment of a state court, and thereby possibly be precluded from a second section, and be compelled to resort to intervention in the state court. The existence of a single penalty, with two distinct conditions affecting different interests, makes the case an unusual one.

The decisions in United States *v.* Henderlong, 102 F. R. 2, and United States *v.* Sheridan, 119 F. R. 236, I regard with great respect. They proceed, however, upon the ground that the United States is a purely formal or modal party in cases where there is a breach of the obligation to pay laborers and materialmen. In neither case was it considered that the actions provided for might affect the pecuniary interest of the United States and its security under the bond, as was the case in actions brought in this circuit. In United States *v.* Sheridan, the matter of benefits to the United States was considered, and it was thought that these were quite incidental, if not speculative. Possibly it was a purpose of the act to benefit the United States by making more certain and prompt the obtaining of labor and materials by contractors. It was possibly the view of Congress that the Government, as a builder of public works, is under such an obligation to those who incorporate their labor and material therein that the United States may insure their payment by exacting a contract for their benefit; and that, in a suit upon such a contract, the United States has the interest of an insurer of persons, in whose protection it has an interest analogous, perhaps, to that which it has in a suit to cancel a patent for lands or for
27 an invention, not because of any benefit to itself, but because of an obligation to the public or individuals. If Congress had sufficient grounds for enacting legislation of this class, has not the United States, as a legal party to the suit, an interest in the suit similar to that of Congress in passing the act authorizing it? There is some inconsistency in saying that the United States has such an obligation to laborers that Congress may require a contract for their benefit, but no such obligation as to give the United States an interest in the suit brought to enforce the contract.

The act has proved difficult to interpret and to apply. Its intended benefits have been impaired by expensive litigation over its interpretation. Congress has put the plaintiff in the shoes of the United States as a suitor, without expressly taking away the right to

sue in a court of the United States. Adler *v.* Newcomb, 2 Dillon, 45. Shall we take this right away by implication? The bar, in many actions in this circuit, have interpreted this act as conferring jurisdiction upon the United States courts. It seems by no means certain that it was not the intent of Congress to subrogate the materialman and laborer to all the rights of the United States as a suitor on its own contract.

The danger that statutes conferring jurisdiction on United States courts may be abused, through the use of nominal parties, is to be guarded against. When Congress, however, with power to confer jurisdiction, expressly declares that the United States shall take a contract upon which persons may sue in the name of the United States, is there any practical danger in saying that Congress
28 meant exactly what it said, and meant it with no further qualification than that expressly stated?

I have before me, as the legal plaintiff, the United States; a legal cause of action—a contract between the United States and the contractor. It is the ordinary rule that the existence of a beneficial or use plaintiff does not affect the legal status of the case. To one bred in common law practice this is sufficient, in the absence of strong reasons to the contrary. In the case of Boston Elevated Ry. Co. *v.* Grace & Hyde, 112 F. R. 279, the Circuit Court of Appeals for this Circuit had occasion to consider actions for use and benefit, and the divisibility of such causes of action; and that case well illustrates the difficulties of a departure from a common law status.

While, in some cases, to look through the nominal parties to the real parties in interest is easy; in other cases where, in a single legal contract, there is a diversity of beneficial interests, a splitting up of the case is impracticable. Such a division seems impracticable in a case where a suit is for the penal sum of a bond in which various persons have an interest. The fact that, in the ordinary bond, the United States has a real and substantial interest, seems a fair reason for adopting the view that it was the intention of Congress that, in all suits for use, the plaintiff should have the general rights of the United States to sue in federal courts.

The plaintiff's counsel contend that jurisdiction can be supported on two distinct grounds: first, because the United States has, in fact, such an interest in these suits as answers the authorities and
29 gives a reasonable basis for federal jurisdiction; second, because in addition to the provisions which authorize the suit to be brought in the name of the United States are provisions, regulating the procedure in the suits, which seem to be applicable only to federal courts, thus showing an intent that the federal courts were to have jurisdiction. I am of the opinion that we, at least, can say that the cases are within the letter of the statute conferring jurisdiction on the United States courts, and that it is not so clear that they are contrary to the spirit of that statute as to justify a dismissal. The statute was before the Circuit Court of Appeals for the Eight- Circuit in United States *v.* National Surety Co., 34 C. C. A. 526. The amount involved was less than two thousand dollars, and yet the court took jurisdiction of the action, though, so far as the report of

the case shows, the question of jurisdiction was not expressly raised.

The argument that it could not have been the intention of Congress to enlarge the jurisdiction of the United States courts by allowing claims for less than two thousand dollars to be prosecuted, seems by no means conclusive. The public works of the United States are not so numerous that the courts of the United States will be overwhelmed by petty suits. The jurisdiction of the United States courts in admiralty, over the small claims of seamen, has been beneficial, and has served rather to prevent the contesting of small claims than to overcrowd the courts with petty suits. The existence of speedy remedies, free from technical obstacles, encourages the prompt payment of debts. To hold that laborers and materialmen em-
30 ployed on public works of the United States can secure their pay through a suit in a United States court, on a bond given to the United States, will tend to promote the object of the act, and to simplify the procedure to enforce it.

The motions to dismiss for lack of jurisdiction are denied.

31

Citation on Writ of Error.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the United States of America suing for the benefit of James S. Kenyon, of the City and County of Providence, in the State and District of Rhode Island, doing business as Burrows & Kenyon, Greeting:

You are hereby cited and admonished to be and appear in the United States Supreme Court, in the city of Washington, D. C., on the* 30th day of December next, pursuant to a Writ of Error filed in the Clerk's Office of the† Circuit Court of the United States for the District of Rhode Island, wherein The United States Fidelity and Guaranty Company of the State of Maryland is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Arthur L. Brown, Judge of the Circuit Court of the United States for the District of Rhode Island, this 4th day of December, in the year of our Lord one thousand nine hundred and five.

[Seal of Circuit Court, Rhode Island.]

ARTHUR L. BROWN,
United States District Judge.

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*Not exceeding 30 days from the day of signing.
†Name of Court to which Writ of Error is directed.

Due and sufficient service of the citation is hereby acknowledged.

EDWARD D. BASSETT,
Attorney for Defendant in Error.

32 *Clerk's Certificate.*

UNITED STATES OF AMERICA, *District of Rhode Island:*

I, William P. Cross, Clerk of the Circuit Court of the United States for the District of Rhode Island, do hereby certify that the foregoing is a true copy of the record in the cause entitled Law 2713, United States of America, Plaintiff, *vs.* Joseph J. Churchyard, and the United States Fidelity and Guaranty Company, Defendants, in said Circuit Court determined, the Opinion of the Circuit Court on motion to dismiss for want of jurisdiction, and Certificate of Jurisdictional Question by Trial Judge, the Petition for Writ of Error, the Bond on Writ of Error and the Assignment of Errors, also the original Citation issued on the Writ of Error in said cause, with the Acknowledgment of Service thereon.

In testimony whereof I hereunto set my hand and affix the seal of said Circuit Court, at Providence, in said district, this nineteenth day of December, A. D., 1905.

[Seal of Circuit Court, Rhode Island.]

WILLIAM P. CROSS, *Clerk.*

Endorsed on cover: File No. 20,024. Rhode Island C. C. U. S. Term No. 173. The United States Fidelity and Guaranty Company, plaintiff in error, *vs.* The United States of America, suing for the benefit of James S. Kenyon, doing business as Burrows & Kenyon. Filed December 26th, 1905. File No. 20,024.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1906.

No. 173

THE UNITED STATES FIDELITY AND GUARANTY COMPANY,

PLAINTIFF IN ERROR,

vs.

THE UNITED STATES OF AMERICA,

SUING FOR THE BENEFIT OF JAMES S. KENYON, DOING BUSINESS AS BURROWS & KENYON.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF RHODE ISLAND.

Brief for Plaintiff in Error

This case comes before the court on writ of error to the Circuit Court of the United States for the District of Rhode Island, the jurisdiction of the Circuit Court being in issue and the jurisdictional question alone being certified to this court under the provision of the Act of Congress, March 3, 1891, c. 517 § 5, 26 Stat. 827.

STATEMENT.

This action was brought on a bond given by Joseph J. Churchyard, a government contractor, to the United States of America, under the Act of Congress of August

13, 1894, Chapter 280, § 1; 28 Stat. 278.* One of the conditions of the bond was that the obligor, said Churchyard, should promptly make payment to all persons supplying him labor or materials in the prosecution of the work provided for in his contract with the government. James S. Kenyon, the party for whose use this suit was brought in the name of the United States of America, a lumber dealer in the City of Providence, sold lumber to Churchyard to be used in government contracts. Not having received payment for the lumber delivered to be used under one contract, suit was brought on Churchyard's bond. The defendant in the court below (plaintiff in error in this court), The United States Fidelity and Guaranty Company, surety on Churchyard's bond, moved in the Circuit Court that the action be dismissed for want of jurisdiction, on the ground that the amount involved, exclusive of interest and costs, was less than $2,000. This motion was

*Act Aug. 13, 1894, c. 280.

An Act for the Protection of Persons Furnishing Material and Labor for the Construction of Public Works. (28 Stat. 278.)

Bonds of contractors for public buildings or works.

Be it enacted, &c., That hereafter any person or persons entering into a formal contract with the United States for the construction of any public building, or the prosecution and completion of any public work or for repairs upon any public building or public work, shall be required before commencing such work to execute the usual penal bond, with good and sufficient sureties, with the additional obligations that such contractor or contractors shall promptly make payments to all persons supplying him or them labor and materials in the prosecution of the work provided for in such con.

denied and judgment was subsequently entered against the surety company on the bond; to which ruling of the court and entry of judgment the surety company duly excepted. Thereafter the action was brought to this court on writ of error.

CERTIFICATE OF JURISDICTIONAL QUESTION.

The jurisdictional question raised in this case, as shown by the certificate of the trial judge (Record p. 9), is as follows:

Does the Circuit Court of the United States have jurisdiction to entertain an action in the name of the United States, for the use and benefit of a person supplying labor and materials for public buildings or work, upon a certified

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tract; and any person or persons making application therefor, and furnishing affidavit to the department under the direction of which said work is being or has been, prosecuted, that labor or materials for the prosecution of such work has been supplied by him or them, and payment for which has not been made, shall be furnished with a certified copy of said contract and bond, upon which said person or persons supplying such labor and materials shall have a right of action, and shall be authorized to bring suit in the name of the United States for his or their use and benefit against said contractor and sureties and to prosecute the same to final judgment and execution: Provided, That such action and its prosecutions shall involve the United States in no expense.

Security for costs in actions on bonds.

Sec. 2. Provided that in such case the court in which such action is brought is authorized to require proper security for costs in case judgment is for the defendant.

copy of a bond given under the provisions of the Act of Congress of August 13, 1894, Chapter 280, Section 1, 28 Stat. 278, entitled "An Act for the Protection of Persons Furnishing Material and Labor for the Construction of Public Works," wherein the amount involved is less than two thousand dollars ($2000.)?

POINTS OF LAW.

I.

The amount involved in this case being less than $2,000 the jurisdiction of the Circuit Court must fail unless the Act creating the Right confers jurisdiction or unless this is a controversy in which the United States is Plaintiff, all other Federal jurisdictional requirements being wanting.

A

THE ACT OF AUGUST 13, 1894, CHAPTER 280* DOES NOT CONFER JURISDICTION OF THIS CASE UPON THE CIRCUIT COURT.

There is no language in the act which confers jurisdiction upon the Circuit Court of an action on a bond provided for therein. Jurisdiction of a case of this kind cannot be conferred by implication. In the absence of an express provision to that effect, jurisdiction must

*See statute printed in full at page 2.

fail unless it is given by some other statutory provision.

It is a fundamental principle of federal jurisdiction that the Circuit Courts are a creation of Congress under the power given that body by the constitution and upon that body they must depend for all the powers they possess. This is well expressed in an opinion by Livingston, Circuit Judge, in the case of

Livingston vs. *Van Ingen*, Fed. Cas. No. 8420 (1811),

in the Circuit Court for the District of New York (p. 698):

> "It is as certain, that they [the Circuit Courts] are indebted to congress, under the constitution, for their creation, and that instead of extending their powers as the exigencies of suitors may require, or may by themselves be thought reasonable, they have hitherto been regarded as dependent on that body for all the powers they possess. Owing as they do their existence to congress, from them must necessarily flow that portion of the general judicial power which, by the constitution they have a right to divide among the inferior courts that may be established. . . ."

The extent to which this principle was extended is shown in this same case by the answer of the court to the argument that the parties might be without remedy in other courts (p. 700):

> "But if absolutely without remedy elsewhere, it does not follow that this court can help them. A court, constituted like this, is not to reason itself into jurisdiction from considerations of hardship, when a plain and safe rule is prescribed by the supreme court, which is, to examine on all occa-

sions, what powers are committed to it by the laws of the United States."

In the case of

The Bank of the United States v. *Deveaux*, 5 Cranch, 61 (1809),

the question arose of the right of the Bank of the United States to sue in the Circuit Court. The bank was created by act of Congress, and Mr. Chief Justice Marshall, in discussing the question of jurisdiction, used the following language which has an important bearing on the case at bar (p. 86):

> "But the 9th article of the 7th section of the act furnishes a conclusive argument against the construction for which the plaintiffs contend. That section subjects the president and directors, in their individual capacity, to the suit of any person aggrieved by their putting into circulation more notes than is permitted by law, and expressly authorizes the bringing of that action in the federal or state courts.
>
> "This evinces the opinion of congress that the right to sue does not imply a right to sue in the courts of the Union, unless it be expressed. This idea is strengthened also by the law respecting patent rights. That law expressly recognizes the right of the patentee to sue in the circuit courts of the United States."

And as bearing on the question of jurisdiction, the duty of a court in interpreting its own powers is thus well expressed by the same learned judge (p. 87):

> "The duties of this court, to exercise jurisdiction where it is conferred, and not to usurp it where it is not conferred, are of equal obligation.

> The constitution, therefore, and the law are to be expounded, without a leaning the one way or the other, according to those general principles which usually govern in the construction of fundamental or other laws."

In the case of

Harrison v. *Hadley*, Fed. Cas. No. 6137 (1873),

District Judge Caldwell, in the Circuit Court for the Eastern District of Arkansas, used this significant language (p. 651):

> "But the principle is now established that the circuit court of the United States can exercise jurisdiction in no case solely upon the ground that it falls within the constitutional grant of judicial power to the United States. There must also be an act of congress expressly conferring the jurisdiction. The circuit court is a court of limited jurisdiction and the supreme court has said that 'the fair presumption is that a cause is without its [the circuit court] jurisdiction till the contrary appears.'"

Among other cases are cited:

> *Turner* v. *Bank of North America*, 4 Dall. 8,
> *United States* v. *Hudson*, 7 Cranch, 32,
> *McIntire* v. *Wood*, 7 Cranch, 506,
> *Sheldon* v. *Still*, 8 How. 441.

The further language of this judge in the same case (p. 651) has peculiar force in the case at bar and sustains the principle contended for here:

> "And a right of action given by an act of Congress 'does not imply a right to sue in the courts of the United States unless it is expressed.'—*Bank of United States* v. *Devaux*, 5 Cranch, 61, 86."

In

Re Barry, 42 Fed. R. 113 (1844),

the court says (p. 122):

> "... it is authoritatively established that the circuit courts, at least, cannot exercise jurisdiction as to individual rights, because authorized by the constitution, unless congress has specifically assigned it to them. They possess no jurisdiction other than that which both the constitution and acts of congress concur in conferring upon them."

The court further says (p. 127):

> "This view of the subject disregards the special organization of the United States circuit courts, and the limited purposes they were designed to subserve. They are distributed among the states, to exercise that special jurisdiction bestowed upon the federal government, or shared with it by the state sovereignties, and not to carry with them an inherent power to resort to or employ any other law than that given them by express and written grant. *Chisholm* v. *Georgia*, 2 Dall. 432, 435; *Ex parte Barry*, 2 How. 65."

In

Karrahoo v. *Adams*, Fed. Cas. No. 7614 (1870),

it is said by Dillon, Circuit Judge (p. 135):

> "Again, it is to be remembered that the circuit court is a court of limited jurisdiction, and can exercise it only in cases in which it is expressly conferred by congress."

The principle governing the jurisdiction of the inferior federal courts is thus expressed by Mr. Justice Clifford in the case of the

Sewing Machine Companies, 18 Wall., 553, 557:

"Circuit Courts do not derive their judicial power, immediately, from the Constitution, as appears with sufficient explicitness from the Constitution itself, as the first section of the third article provides that 'the judicial power of the United States shall be vested in one Supreme Court and in such inferior courts as the Congress may from time to time ordain and establish.' Consequently the jurisdiction of the Circuit Court in every case must depend upon some act of Congress, as it is clear that Congress, inasmuch as it possesses the power to ordain and establish all courts inferior to the Supreme Court, may also define their jurisdiction. Courts created by statute can have no jurisdiction in controversies between party and party but such as the statute confers. Congress, it may be conceded, may confer such jurisdiction upon the Circuit Courts as it may see fit, within the scope of the judicial power of the Constitution, not vested in the Supreme Court, but as such tribunals are neither created by the Constitution nor is their jurisdiction defined by that instrument, it follows that inasmuch as they are created by an act of Congress it is necessary, in every attempt to define their power, to look to that source as the means of accomplishing the end. Federal judicial power, beyond all doubt, has its *origin* in the Constitution, but the organization of the system and the distribution of the subjects of jurisdiction among such inferior courts as Congress may from time to time ordain and establish, within the scope of the judicial power, always have been, and of right must be the work of the Congress."

In the case of

Wisconsin v. *Duluth*, Fed. Cas. No. 17, 902 (1872), presided over by Circuit Justice Miller and Circuit Judge Dillon, Mr. Justice Miller treats as rudimentary

the principle that jurisdiction of the Circuit Courts must be expressly conferred, saying:

> "It is a proposition which admits of no further debate, and needs the citation of no authorities at this day, that all courts of the United States, except the supreme court, being the mere creatures of congressional statute, can exercise no jurisdiction but such as is given by those statutes . . ."

Jurisdiction may exist in certain cases by implication, such as for example, the jurisdiction to enforce its own orders and decrees by proceedings for contempt as suggested by Mr. Justice Johnson in the case of

> *The United States* v. *Hudson & Goodwin*, 7 Cranch, 32.

This principle in the abstract may be stated thus: Jurisdiction for the enforcement of any right may be implied, where the enforcement of such right is essential to the integrity and existence of the court. But no case has been found in which jurisdiction of a new right, created by Act of Congress, has been held to be in the Federal Courts by implication, since Congress must have intended such jurisdiction by reason of creating the right.

The application to this case of the principle underlying the above authorities is as follows:

The creation by Congress of a new right does not confer jurisdiction upon the Circuit Courts to enforce such right in the absence of an express provision, conferring jurisdiction. The act of August 13, 1894, chapter 280, contains no such grant of jurisdiction. The Circuit Court for the District of Rhode Island did

not therefore have jurisdiction of this action unless jurisdiction was conferred by some other Act of Congress.

B

THIS IS NOT A CONTROVERSY IN WHICH THE UNITED STATES IS PLAINTIFF WITHIN THE CONTEMPLATION OF THE STATUTE WHICH CONFERS ON THE CIRCUIT COURT JURISDICTION IRRESPECTIVELY OF THE AMOUNT INVOLVED.

Since jurisdiction was not conferred by the act creating the right, we must look elsewhere to determine whether by any other Act of Congress, the Circuit Court has jurisdiction. The Act of Congress (24 Stat. 552, 25 Stat. 433, Comp. Stat. p. 508) which confers jurisdiction generally on the Circuit Courts provides that they shall have original cognizance, concurrent with the courts of the several states, of all suits of a civil nature, at common law or in equity, in which controversy the United States is plaintiff. The question then arises, is the United States plaintiff in this action within the contemplation of this act so as to confer jurisdiction upon the Circuit Courts irrespectively of the amount involved?

The act of August 13, 1894, Chapter 280, provides that any person entering into a contract with the United States for the construction of any public building shall be required before commencing such work to execute the usual penal bond with surety (*i. e.* a bond to perform the contract entered into according to its terms) with the additional obligation that such contractor shall promptly make payment to all persons supplying him

materials in the prosecution of the work; a person furnishing materials not paid for shall be furnished with a certified copy of the bond upon which he shall have a right of action," and shall be authorized to bring suit in the name of the United States for his or their use or benefit against said contractor and sureties and to prosecute to final judgment and execution: Provided, *that such action and its prosecution shall involve the United States in no expense.*" [Italics ours.]

This action was brought in the name of the United States for the benefit of and on behalf of James S. Kenyon, as expressed in the declaration (Record p. 3), upon a bond given under the provisions of this act, James S. Kenyon having sold to a government contractor for use upon public works, lumber for which he has never been paid.

This act provides for two distinct rights, viz., the protection of the United States against the nonfulfillment of its contracts and the protection of parties furnishing labor or materials to such contractors. The twofold nature of this obligation is set forth by Thayer, Circuit Judge, in the case of

> *United States to use of Anniston Pipe & Foundry Company* v. *National Surety Company*, 92 Fed. R. 549 (1899).

He says (p. 551):

> "The bond which is provided for by the act was intended to perform a double function,—in the first place to secure to the government, as before, the faithful performance of all obligations which a contractor might assume towards it; and, in the second place, to protect third persons from whom

the contractor obtained materials or labor. Viewed in its latter aspect, the bond, by virtue of the operation of the statute, contains an agreement between the obligors therein and such third parties that they shall be paid for whatever labor or materials they may supply to enable the principal in the bond to execute his contract with the United States. The two agreements which the bond contains, the one for the benefit of the government, and the one for the benefit of third persons, are as distinct as if they were contained in separate instruments, *the government's name being used as obligee in the latter agreement merely as a matter of convenience.*" [Italics ours.]

The same learned judge further observes (p. 550):

"... The suit is not brought by the United States to recover any damage which it has sustained; neither is it brought to enforce any provision of the contract which was entered into between the United States and the principal in the bond. On the contrary, the action is one to enforce a stipulation found in the bond, and only in the bond, which was intended solely for the protection of laborers and material men who might furnish labor and materials while the contract was being executed by Prosser. The United States is merely a nominal plaintiff, and as such, under the provisions of the act of congress, it cannot be held liable even for costs. The real plaintiff is the corporation for whose use the suit was brought, and it sues to enforce an obligation which congress required to be inserted in the bond for its protection and for the protection of others who might furnish labor or materials while the work was in progress."

This court, in the case of

Guaranty Co. v. *Pressed Brick Company*, 191 U. S. 416 (1903),

placed the same construction upon this statute.

Mr. Justice Brown says (p. 425):

> "This covenant, however, is inserted for an entirely different purpose from that of securing to the government the performance of the contract for the construction of the building. Inasmuch as neither the contractor nor his sub-contractors can secure themselves by a mechanic's lien upon the proposed building, the government, solely for the protection of the latter, requires a covenant for the prompt payment of their claims, and the same security that it requires for the performance of the principal contract. In this covenant the surety guarantees nothing to the principal obligee—the government—though the latter permits an action upon the bond for the benefit of the sub-contractors. The covenant is made solely for their benefit."

When the twofold character of this obligation is appreciated, the case is simplified. Necessarily, from the circumstances of the case, the obligee for the benefit of the material men must be some person arbitrarily designated. It was natural for the sake of convenience to have the bond made to the United States. It is difficult to conceive a case where a plaintiff would be more formal or modal than in a case of this nature. The United States is not empowered to bring a suit of its own motion against the obligors on such bonds to receive what is due to laborers and material men. Suit may be instituted by the parties beneficially interested without

obtaining the consent of the United States, and no control is exercised by the legal department of the government over such litigation. The act further provides that such action and its prosecution shall involve the United States in no expense. This would seem to lead beyond peradventure to the conclusion that the relation of the United States to this suit is purely formal. In this view of the case, has the Circuit Court jurisdiction because the action is brought in the name of the United States?

From the case of

Browne v. *Strode*, 5 Cranch, 303 (1809),

through a long line of federal cases both in this court and in the lower courts, the rule has been to regard the real rather than the merely nominal parties in determining questions of jurisdiction, whenever substantive or adjective rights of parties would be affected by the discrimination.

The last mentioned case was a suit on an executor's bond, in the name of the justices of peace of Stafford County who were all citizens of Virginia, by an alien to recover a debt against the defendant, also a citizen of Virginia. The court held that the Circuit Court had jurisdiction.

In

McNutt v. *Bland*, 2 How. 9 (1844),

an action had been brought on a sheriff's bond in the name of the governor of Mississippi, the nominal obligee on the bond, for the benefit of certain citizens of New York, against Bland, a sheriff and his surety, citizens of the State of Mississippi. It held that the

Circuit Court had jurisdiction. Mr. Justice Baldwin said (p. 14):

> ". . . We can perceive no sound reason for denying the right of prosecuting the same cause of action against the sheriff and his sureties in the bond by and in the name of the governor, who is a purely naked trustee for any party injured. He is a mere conduit through whom the law affords a remedy to the person injured by the acts or omissions of the sheriff; the governor cannot prevent the institution or prosecution of the suit, nor has he any control over it. The real and only plaintiffs are the plaintiffs in the execution who have a legal right to make the bond available for their indemnity, which right could not be contested in a state court of Mississippi, nor in a circuit court of the United States, in any other mode of proceeding than on the sheriff's bond."

Mr. Justice Field in the case of

Coal Co. v. *Blatchford*, 11 Wall. 172 (1870),

in distinguishing the difference between a case like the one at bar and a suit by a trustee, makes the following observation:

> "There is no analogy between these cases [citing 5 Cranch, 303, and 2 How. 10] and the case at bar. The nominal plaintiffs in those cases were not trustees and held nothing for the use or benefit of the real parties in interest. They could not as is said in *McNutt* v. *Bland*, prevent the institution or prosecution of the actions or exercise any control over them. The justices of the peace in the one case, and the governor in the other, were the mere conduits through whom the law afforded a remedy to the parties aggrieved."

Cases to the same effect are

Huff v. *Hutchinson*, 14 How. 586 (1852),
Walden v. *Skinner*, 101 U. S. 577, 589 (1879),
Wade v. *Wortman*, 29 Fed. R. 754 (1887).

Where a state is a nominal party, the Federal Courts in determining jurisdiction, disregard the technical parties to the record, and that not only in cases where the joinder of the state is a subterfuge to avoid the Eleventh Amendment, as in

New Hampshire v. *Louisiana*, 108 U.S. 76 (1883);

but in cases of pleading entirely beyond the control of the parties. Such was the rule in

State of Maryland v. *Baldwin*, 112 U. S. 490 (1884),

which was an action on an administrator's bond, taken in the name of the state for the benefit of such person as should be interested, brought in the state court against citizens of Maryland. It was removed to the Circuit Court on the ground that the real complainants were citizens of New Jersey. The Supreme Court sustained the removal, Mr. Justice Field saying (p.491):

> "The name of the state is used from necessity when a suit on the bond is prosecuted for the benefit of a person thus interested, and, in such cases, *the real controversy is between him and the obligors on the bond.*" [Italics ours].
>
> (p. 492). "So in the present case the State is a mere nominal party; she could not prevent the institution of the action, nor control the proceedings or the judgment therein. The case must be treated, so far as the jurisdiction of the Circuit Court of the United States is concerned, as though

Markley was alone named as plaintiff; and the action was properly removed to that court."

Similar doctrine forms the basis of decision in

State v. *Bowles, etc., Co.*, 80 Fed. R. 161 (1897),
Arkansas v. *Bell*, Fed. Cas. No. 530(1847).

In the former case, which was an action on an attachment bond, Adams, D. J., in upholding the jurisdiction of the Circuit Court, said (p. 161):

> " . . . in such suit the state is at best only a nominal party, without any interest. It does not institute or control the litigation by any of its law officers. On the contrary, the party in interest to whose use the suit is brought has a legal right to make use of the name of the state, not for the benefit or at the peril of the state, but as a matter of personal right, and for his own purposes exclusively. The real controversy in this case is, therefore, between the relator, a citizen of Illinois, and the defendants, citizens of Missouri, and as there is no controversy between the state of Missouri and the defendants, the formal use of the name of the state of Missouri as a supposed necessary party cannot oust this court of jurisdiction."

Where the United States is a nominal party, the rule that the court will disregard that fact and proceed as if the real party in interest were the record party, is equally well established.

In

United States v. *Beebe*, 127 U. S. 338(1888),

the relators claimed that the defendants were the successors in title of a patentee of land who had obtained his grant in fraud of themselves, the real owners. The defendants set up laches, which defense, the relators

contended, was invalid against the government. The defense was held good, however, Mr. Justice Lamar saying (p. 347):

> "We are of the opinion that when the Government is a mere formal complainant in a suit, not for the purpose of asserting any public right or protecting any public interest, title or property, but merely to form a conduit through which one private person can conduct litigation against another private person, a court of equity will not be restrained from administering the equities existing between the real parties by any exemption of the Government designed for the protection of the rights of the United States alone."

He further says (p. 346):

> ". . . An inspection of the record shows that the Government, though in name the complainant, is not the real contestant party to the title or property in the land in controversy. It has no interest in the suit and has nothing to gain from the relief prayed for and nothing to lose if the relief is denied."

The doctrine was adhered to in the case of

> *Stewart* v. *B. & O. R. R. Co.*, 168 U. S. 445 (1897).

This was an action brought in the District of Columbia by the administrator of the deceased, for the tortious killing of the intestate by the defendant in Maryland, where the statute requires that such an action should be brought in the name of the state. It was held that there was no material inconsistency in the statutes of Maryland and the District of Columbia, Mr. Justice Brewer remarking (p. 449):

". . . The two statutes differ as to the party in whose name the suit is to be brought. In Maryland the plaintiff is the State; in this District, the personal representative of the deceased. But neither the State in the one case nor the personal representative in the other has any pecuniary interest in the recovery. Each is simply a nominal party plaintiff. . .

"*For purposes of jurisdiction in the Federal courts, regard is had to the real rather than to the nominal party.*" [Italics ours.]

The case of

Howard v. *United States*, 184 U. S. 676 (1902),

has some bearing on the case under consideration. This was an action brought in the name of the United States for the benefit of Stewart, a citizen of Maine, against the sureties upon the bond of Watson, as clerk of the Circuit Court of the United States for the Western Division of the Western District of Missouri. The court, speaking through Mr. Justice Harlan, says (p.680):

"The opposite parties here are Stewart, the relator, a citizen of Maine, for whose benefit the suit was brought, and the sureties on the bond of Watson, who are all citizens of Missouri. The Government is the nominal, while Stewart is the real, plaintiff. His citizenship is to be regarded in an inquiry as to jurisdiction."

In support are cited

Browne v. *Strode*, 5 Cranch, 303,
McNutt v. *Bland*, 2 How. 9,
Maryland v. *Baldwin*, 112 U. S. 490.

The court also considers and affirms the doctrine of

Browne v. *Strode*. The rule to be deduced from the case of *Howard* v. *United States* is that where the United States is the plaintiff for the benefit of an individual in a suit upon a bond wherein it is named as obligee, the general principle in determining jurisdiction dependent on citizenship or character of the parties, set forth above in a long line of authorities applies even though the United States has an incidental interest in such suit, as pronounced as its interest in the bond in the case at bar.

The learned judge before whom the case at bar was tried in the Circuit Court admits the principle that regard is to be had to the real, rather than to the nominal parties for the purposes of jurisdiction in the Federal Courts, but endeavors to bring the present case within an exception to this rule by holding that the United States has an interest in this litigation which makes it more than a formal plaintiff, and for jurisdictional purposes the real plaintiff to this suit. He also bases his decision on the ground that the legal right is in the United States for the benefit of the material men, and such right, among others, is for the material men to avail themselves of the status of the United States as a suitor in the United States courts and to maintain their suits in that forum irrespective of the amount involved (Record p. 13).

The principle to which no exception can be taken is laid down by the court, that the question whether the United States is a party, is not dependent merely upon pecuniary interest (Record p. 12,) citing, In re *Debs*, 158 U. S. 564. The interest of the United States in this phase of the bond is however "quite incidental if not speculative." Its indefinite nature may be under-

stood from the following language of the court:

> "Possibly it was a purpose of the act to benefit the United States by making more certain and prompt the obtaining of labor and materials by contractors. It was possibly the view of Congress that the Government, as a builder of public works, is under such an obligation to those who incorporate their labor and materials therein that the United States may insure their payment by exacting a contract for their benefit . . ." (Record p. 15).

The interest of the United States in an action like the one at bar is derived only from a forced and artificial construction of the act, and it is submitted that the general principle of jurisdiction which would ordinarily apply to the case at bar as laid down by the federal decisions before referred to should not be overruled or held not to apply by reason of such construction.

In the very recent case of

> *Burrell* v. *United States, to use of First National Bank of Everett, Wash.*, 147 Fed. R. 44

decided June 18, 1906, the Circuit Court of Appeals for the Ninth Circuit, speaking through Ross, Cir. J. sustains the position here taken that the United States is not the real plaintiff but simply a formal or modal party—a mere name used for convenience only.

The following cases are cited by the court below in support of its position:

> *United States* v. *Bell Telephone Co.*, 167 U. S. 224 (1897),
> *In re Debs, Petitioner*, 158 U. S. 564 (1895).

We will briefly consider them. In the telephone case, a bill in equity was brought for the cancellation of a patent. The contention was made in a former proceeding in the same case (See 128 U. S. 315) that there was no authority in the United States to maintain such suit. This was overruled. The court in the opinion reported in 128 U. S. 315, says (p. 359):

> "With regard to the jurisdiction of the Circuit Court in which this suit was brought, there does not seem to be any objection made by defendants, if such suit could be brought in any court. Indeed, the language of the act of Congress on that subject does not admit of any such doubt, for it declares 'that the Circuit Courts of the United States shall have original cognizance, concurrent with the courts of the several States, of all suits of a civil nature at common law or in equity, where the matter in dispute exceeds, exclusive of costs, the sum or value of five hundred dollars, and arising under the Constitution or laws of the United States, or treaties made, or which shall be made, under their authority, or in which the United States are plaintiffs or petitioners.' Act of March 3, 1875, 18 Stat. 470.
>
> "In the present case the United States are plaintiffs, and the bill asserts that the suit is one of a civil nature, and of equitable cognizance; and manifestly, if it presents a good cause of action, it arises under the laws and Constitution of the United States. It is, therefore, within the language, both of the Constitution and of the statute conferring jurisdiction on the Circuit Courts. An examination of the specific objections made to the present bill will illustrate and enforce this general view. . . ."

The true criterion, it is submitted, as to whether the

United States is such a party as to give the Circuit Courts jurisdiction on that ground alone, is whether the suit is brought by the United States as the moving party, whether the law department of the government has any charge of the conduct of the litigation, or whether the government is liable for costs or is in any other way affected by the judgment or decree which can be entered.

See in this connection:

> *Minnesota* v. *Hitchcock*, 185 U.S. 373, 387 (1901),
> *Oregon* v. *Hitchcock*, 202 U. S. 60, 69 (1905).

This would seem to be the correct line of distinction. On one side fall the cases brought by the United States to annul patents of land and to cancel patents for inventions (of which latter examples *United States* v. *American Bell Telephone Co.*, 128 U. S. 315, and of the former, *United States* v. *San Jacinto Tin Co.*, 125 U. S. 273, are leading cases), where the United States is the plaintiff within the contemplation of the statute conferring jurisdiction on that ground and on the other side fall the cases where third parties use the name of the United States from the necessity of legal technicalities for the enforcement of their rights without the intervention of the government in such action except in name and without its being in any way affected by the judgment or decree therein.

It may be said of *In re Debs, Petitioner*, 158 U. S. 564, that the ground of jurisdiction there depended upon the right and duty of the United States as the sovereign power, in the protection of the interests of its subjects, to take such steps as were necessary to insure the free

and untrammeled transmissions of the mails. The United States in that case appeared by its law officers and conducted the litigation.

The right of the United States to file a bill in equity to annul a patent for an invention is also placed upon the same principle as governed the decision in the Debs case; the court in the Bell Telephone Co. case (128 U. S. 315, 367) says on this point:

> "The essence of the right of the United States to interfere in the present case is its obligation to protect the public from the monopoly of the patent which was procured by fraud, and it would be difficult to find language more aptly used to include this in the class of cases which are not excluded from the jurisdiction of the court by want of interest in the government of the United States."

These cases, cited in support of the position of the judge in the Circuit Court, bear close analogy to those cases where it is held that a trustee is the real party in interest, in determining a question of jurisdiction in the Federal Courts dependent on citizenship or character of the parties.

It is not difficult to appreciate the difference in principle between these cases last referred to and the case at bar, where any material man can bring suit without a request therefor to the government and without any intervention of the government's law department.

It remains to consider the case of

United States v. *Beebe*, 127 U. S. 338.

This was a suit to set aside a patent to land which was claimed to have been procured from the government by fraud. The United States was not considered the real

plaintiff and it was held that the defendant could set up the defense of laches which he could not have done if the real plaintiff had been the United States. The question of jurisdiction does not appear to have been raised and the case is not considered from the standpoint of jurisdiction being retained because the United States was plaintiff. Jurisdiction may have been predicated upon citizenship of the real parties in interest, or upon its being an action arising under the laws of the United States, the requisite jurisdictional amount having been present. A reading of the opinion and the citation of authorities therein tend to confirm the conclusion that jurisdiction was not dependent upon the United States being a party. The case of *McNutt* v. *Bland*, 2 How. 9 is cited with approval and the court says that the government is a mere formal complainant, a conduit through which one private person can conduct litigation against another private person. With these authorities before the court and with the statement as to the nature of the government's connection with the case, it is only fair to assume that jurisdiction depended upon other grounds than that the suit was in the name of the United States.

The learned judge in the Circuit Court further attempts to support the jurisdiction for the reason that the United States is the legal plaintiff (Record p. 13). Viewed in its twofold aspect, the bond, so far as given by the contractor to fulfill the terms of his contract with the government runs to the United States legally and beneficially, but in its other aspect it runs to the government "merely as a matter of convenience" (Supra p. 13). The former phase of the bond is not before the court. There is no pretense that the government has

brought the action to recover any damage which it has sustained. The United States is no more the legal plaintiff in this case than was the governor of Mississippi in the case of *McNutt* v. *Bland*, 2 How. 9, or the State of Maryland, in the case of *Maryland* v. *Baldwin*, 112 U. S. 490. It is impossible to predicate jurisdiction merely because in another aspect of the bond, there might be a claim in which the United States would be beneficially interested but which forms no part of the case under consideration. To quote again from the opinion of this court in

Guaranty Co. v. *Pressed Brick Company*, 191 U. S. 416, 425:

> "In this covenant the surety guarantees nothing to the principal obligee—the government—though the latter permits an action upon the bond for the benefit of the subcontractors."

And the decision of the court that the material men could not in any way be prejudiced in their right of action by anything done by the United States emphasizes the totally distinct nature of the two covenants and their absolute independence of each other.

The statement by Mr. Justice Brewer in the case of

Stewart v. *B. & O. R. R. Co.*, 168 U. S. 445,

quoted above at page 20, that "for purposes of jurisdiction in the Federal Courts regard is to be had to the real rather than to the nominal party" so unequivocally made, must contain, it is conceived, the principle applicable to the question raised in the case at bar. The general reasoning of the other cases cited from this court is equally pertinent. In this action the government

has no interest nor is it in any sense a trustee to enforce the rights of parties interested in the bond in suit. In the language of Mr. Justice Lamar,

United States v. *Beebe*, 127 U. S. 338, 347

"the Government is a mere formal complainant." It forms "a conduit through which one private person can conduct litigation against another private person" and this litigation is "not for the purpose of asserting any public right or protecting any public interest, title, or property." In the cases cited from this court, jurisdiction was taken in pursuance of the rule, and in spite of the superficial aspect of the record. It would seem, therefore, that *a fortiori* the rule should be applied to sanction a denial of jurisdiction. It is a commonplace of federal practice that the acts of March 3, 1887, c. 373, and August 13, 1888, c. 866, were the expression of a policy to restrict the jurisdiction of the Federal Courts. As was said by Mr. Justice Gray, in

> *Shaw* v. *Quincy Mining Co.*, 145 U. S. 444, 449 (1891),
>
> ". . . the general object of this act as appears upon its face and has often been declared by this court, is to contract, not to enlarge the jurisdiction of the Circuit Courts of the United States."

So also, among the many cases where similar assertions occur, may be mentioned:

> *In re Pennsylvania Company*, 137 U. S. 451,454,
> *Fiske* v. *Henarie*, 142 U. S. 459, 467,
> *Martin* v. *B. & O. R. R. Co.*, 151 U. S. 673, 687,
> *Tennessee* v. *Union & Planters' Bank*, 152 U. S. 454, 462.

In view of this expressed policy of the present law, the court will strive rather to further it by applying a well established rule than by distinguishing, on narrowly technical grounds, the present action from those cases where the rule has been applied, to defeat this salutary policy.

II.

The failure of the Federal Courts to take jurisdiction of cases involving less than $2,000 will result in no deprivation of rights or denial of justice.

The argument thus far, that there is no implied jurisdiction in the Circuit Courts of rights created by Congress, if sound, precludes an appeal to the court to sustain the jurisdiction from any supposed necessity of the case by reason of the material man's inability, in those cases involving less than $2000, to enforce his right in any other forum.

The danger of such failure, however, is non-existent. There is no obstacle to prevent a state court from taking jurisdiction of any action which may be brought on these bonds, including, of course, such as may not be cognizable in this court because involving sums less than $2,000. It is true that that part of the statute which provides that material men may sue on a certified copy of the bond would be without effect in a state court. That fact, however, is immaterial. The giving of the bond has created a substantial right, which may be enforced by action as well in a state court as elsewhere. No difficulty arises from the fact that the plaintiff could

not produce the original instrument in court, or make profert of it in his declaration. As early as

Read v. *Brookman*, 3 T. R. 151,

the law of excuse in lieu of profert was laid down. The case was one of replevin, in which, in his avowry, the defendant made title by a deed, "which said deed is lost and destroyed by time and accident." This was held to be a sufficient excuse for not making profert of the deed, Lord Kenyon (p. 156) intimating that an excuse "such as the urgency and justice of the case will warrant" would always be sufficient; and Buller, J., saying (p. 159):

> "The rule laid down by Lord Coke (In *Leyfield's Case*, 10 Co. 92 a.) extends to all cases of *extreme necessity;* those which he mentions are only put as instances; and wherever a similar necessity exists, the same rule holds."

There are many cases in this country where, similarly it was not insisted that the original of a specialty must be produced.

In

Brents v. *Sthal*, 3 Bibb, (Ky.) 482,

it is said (p. 483):

> "The plaintiff then having no right to the possession of the bond, cannot be compelled to produce it; for it is an established rule that a party need not make profert of a bond or other deed, to the possession of which he is not entitled."

In

Duvall v. *Craig*, 2 Wheat. 45,

Story, J. says (p. 61):

"Another exception is, that there is no profert of the assignment described in the breach, nor is it shown to have been made for a valuable consideration. Various answers have been given at the bar to this exception; and, without deciding on others, it is a sufficient answer that the plaintiff is neither a party nor privy to the assignment, nor conusant of the consideration upon which it was made, and therefore is not bound to make a profert of it, or show the consideration upon which it was made."

1 Chitty on Pleading, 14 Amer. Ed., p. 365.

". . . where the plaintiff has no right to the possession of it, or of the counterpart, a profert is unnecessary."

Similar cases are

Adams v. *State*, 6 Ark. (1 Eng.) 497,
Clark v. *Nixon*, 5 Hill (N. Y.) 36, Supreme Court,
Waller's Exec. v. *Ellis*, 2 Munford (Va.) 88, 96,
Butler v. *State*, 5 Gill and J. (Md.) 511,
Wheeler v. *Miller*, 2 Den. (N. Y.) 172, Supreme Court,
Hinsdale v. *Miles*, 5 Conn. 331, *(dictum)*,
French v. *Marstin*, 24 N. H. 440, 452,
Smith v. *Lloyd*, 16 Gratt. (Va.) 295,
Respublica v. *Coates*, 1 Yeates, (Penn.) 2,
Note 1 to *Jevens* v. *Harridge*, 1 Saunders 8 b. [9].

See the instructive opinion by Mr. Justice Bradley in *Claflin* v. *Houseman*, *assignee*, 93 U. S. 130, upon the question of enforcement in State Courts of rights created by Acts of Congress. He says (p. 137):

"If an act of Congress gives a penalty to a party aggrieved, without specifying a remedy for its enforcement, there is no reason why it should not

be enforced, if not provided otherwise by some act of Congress, by a proper action in a State court. The fact that a State court derives its existence and functions from the State laws is no reason why it should not afford relief; because it is subject also to the laws of the United States, and is just as much bound to recognize these as operative within the State as it is to recognize the State laws. The two together form one system of jurisprudence which constitutes the law of the land for the State; and the courts of the two jurisdictions are not foreign to each other, nor to be treated by each other as such, but as courts of the same country, having jurisdiction partly different and partly concurrent."

Not only is the conclusion that a state court would take jurisdiction, and be fully able to give an adequate remedy on the bond, justified by *a priori* deductions from common-law principles, but as a practical matter such bonds have been put in action in state courts, and no difficulty seems to have been encountered in administering relief. Some of the cases where this has been done are

United States v. *Stratford*, 65 N. Y. Supp. 1051,
United States v. *Fidelity & Deposit Co.*, 83 N. Y. Supp. 752,
United States v. *Hegeman*, 204 Pa. St. 438,
American Surety Co. v. *United States*, 127 Ala. 349,
United States v. *Rundle*, 27 Wash. 7,
United States v. *Jack*, 124 Mich. 210,
American Surety Co. v. *United States*, 77 Ill. App. 106,
United States v. *Henningsen*, 82 Pac. 171, (Wash.),
United States v. *Murdock*, 59 Atl. 60 Me. (1904).

The case of *United States, for the use of Hill* v. *American Surety Company*, 200 U. S. 197 (1906) was brought to this court on writ of error to the Superior Court of the State of Washington, but no question as to the jurisdiction of the State court was raised.

III

The Identical Question of Jurisdiction has already been decided in accordance with the contention of the plaintiff in error in three exactly similar cases.

In the case of

United States v. *Henderlong*, 102 Fed. R. 2 (C. C., D. Ind.),

Judge Baker, in a well-reasoned opinion says (p. 4):

"If this court possesses jurisdiction, it must be found in the first section of the judiciary act of March 3, 1887 . . . The right of action created by the bond in favor of laborers and material men is exclusively vested in them by the statute. They alone are authorized to bring the suit, and to prosecute the same to final judgment and execution. The United States have no interest, either directly or indirectly, in the controversy, nor can they be made liable for costs . . . Is the present suit a controversy in which the United States are plaintiffs or petitioners, within the true meaning of the first section of the present judiciary act? . . . In order that the United States shall become plaintiffs in a case or controversy in a judicial tribunal, they must have some interest in the matter in issue. Where the plaintiff's statement of his case discloses that he has no interest in the controversy, and it affirmatively

> appears that the right to the matter in controversy is vested wholly in some one else, it is difficult to perceive how such person can be said to have a case or controversy . . . The United States are simply a formal or modal party—a mere name used for convenience only. The right of action is vested solely in the Edward Hines Lumber Company . . . The statute merely delegates authority to the laborer or material man to use the name of the United States for his use and benefit in any court having jurisdiction of the subject-matter and the parties. It can hardly be supposed that it was the purpose of the statute to authorize a laborer or material man to prosecute petty claims, involving only a few dollars, in this court, when a more speedy and inexpensive trial can be had in the courts of the state. This is obvious from the fact that congress has manifested a steady purpose to restrict, rather than to enlarge, the jurisdiction of the courts of the United States. No reason is perceived why the courts of the United States should take cognizance of the suits of laborers and material men, unless the citizenship of the parties and the amount involved in the controversy are such as would give jurisdiction as in the case of other suitors."

In

United States v. *Sheridan*, 119 Fed. R., 236 (C. C. W. D Ky.),

Judge Evans, in a carefully considered opinion, adopts the same general reasoning, and reaches the same conclusion as the former case, which he cites with approval.

Since the decision in the case at bar was passed down, the same question has been before the Circuit Court for the Northern District of California, in the case of

United States ex rel. Maxwell v. *Barrett*, 135 Fed. R. 189,

and in an exhaustive opinion, Judge Hunt reached a conclusion in accord with the cases last cited and jurisdiction was denied. The learned Judge says (p. 193):

> " National courts inferior to the Supreme Court are clothed with such powers as Congress has conferred upon them. The doctrine, negatively expressed, is that such courts have no other or greater jurisdiction than that which Congress apportions to them. The potential power ceded to the United States by section 2 of article 3 of the Constitution may be called into exercise by Congress, which possesses the right to establish inferior courts, and to partition among them all or any part of the judicial powers not vested in the Supreme Court. Courts created by Congress can exercise such powers only as are expressly conferred upon them. They cannot take jurisdiction by mere implication. They have no jurisdiction by intendment.
>
> " Congress may withhold from the courts of its creation jurisdiction of controversies to which the United States is a nominal party. Unless such power is conferred it is withheld, for statutory courts can have no jurisdiction but such as the statute confers. *Sheldon* vs. *Hill*, 8 How. 441, 12 L. Ed. 1147.
>
> " Circuit Courts have cognizance of any controversy in which the United States is plaintiff. In the case at bar the United States is not, in the proper sense or within the intent of Congress, plaintiff in the controversy presented, for it is without concern or interest therein. Maxwell himself recognized this fact when in the title of the case he designated himself as the plaintiff, when he described himself in the body of the complaint as

plaintiff, and when, in the verification, he swore that he was plaintiff. I think Congress intended to confer a jurisdiction over suits and actions in which are controversies affecting the United States as plaintiff, and in which the government of the United States is more than a mere figurehead. . ."

No reported case has been found in support of the opposite doctrine, except the opinion in the case at bar.

IV.

The act approved February 24, 1905, entitled "An act to amend an act approved August 13, 1894, entitled 'An act for the protection of persons furnishing materials and labor for the construction of public works'" does not in any way affect the decision of the case at bar.

Congress, at the session immediately following the handing down of the opinion in the case at bar, passed an act, which was approved February 24, 1905, amending the act of August 13, 1894. The full text of the latter act, which will be hereafter referred to as the "amended act," is printed in the margin.* The act of

*[Act of Feb. 24, 1905, Ch. 778, 32 Stat. L. 811.]
An Act to amend an Act approved August 13, 1894, entitled "An Act for the protection of persons furnishing materials and labor for the construction of public works."

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the act entitled "An Act for the protection of persons furnishing materials and labor for the construction of public works," approved August 13, 1894, is hereby amended so as to read as follows:

August 13, 1894, will hereafter be referred to as the "original act." It remains to consider the effect, if any, of the amended act upon the case at bar.

A

The Amended Act is not retroactive.

It suffices to say, under the rule of construction of statutes adopted by this court, that in the absence of any language in the amended act showing an intention

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That hereafter any person or persons entering into a formal contract with the United States for the construction of any public building, or the prosecution and completion of any public work, or for repairs upon any public building or public work, shall be required, before commencing such work, to execute the usual penal bond, with good and sufficient sureties, with the additional obligation that such contractor or contractors shall promptly make payments to all persons supplying him or them with labor and materials in the prosecution of the work provided for in such contract; and any person, company or corporation who has furnished labor or materials used in the construction or repair of any public building or public work, and payment for which has not been made, shall have the right to intervene and be made a party to any action instituted by the United States on the bond of the contractor, and to have their rights and claims adjudicated in such action and judgment rendered thereon, subject, however, to the priority of the claim and judgment of the United States. If the full amount of the liability of the surety on said bond is insufficient to pay the full amount of said claims and demands, then, after paying the full amount due the United States, the remainder shall be distributed *pro rata*

on the part of Congress to have its provisions retroactive, its provisions should be construed prospectively only.

Murray v. *Gibson*, 15 How. 421 (1853),
McEwen v. *Den*, 24 How. 242 (1860),
Harvey v. *Tyler*, 2 Wall. 328, 347 (1864),
Twenty per Cent Cases, 20 Wall. 179, 187 (1873),
Chew Heong v. *United States*, 112 U. S. 536, 559 (1884),
Shreveport v. *Cole*, 129 U. S. 36, 43 (1888).

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among said interveners. If no suit should be brought by the United States within six months from the completion and final settlement of said contract, then the person or persons supplying the contractor with labor and materials shall, upon application therefor, and furnishing affidavit to the department under the direction of which said work has been prosecuted that labor or materials for the prosecution of such work has been supplied by him or them, and payment for which has not been made, be furnished with a certified copy of said contract and bond, upon which he or they shall have a right of action, and shall be, and are hereby, authorized to bring suit in the name of the United States in the Circuit Court of the United States in the district in which said contract was to be performed and executed, irrespective of the amount in controversy in such suit, and not elsewhere, for his or their use and benefit, against said contractor and his sureties, and to prosecute the same to final judgment and execution: *Provided*, that where suit is instituted by any of such creditors on the bond of the contractor it shall not be commenced until after the complete performance of said contract and final settlement thereof, and shall be commenced within one year after the performance and final settlement of said contract, and not later: *And provided further* that where suit is so instituted by a creditor or by creditors, only one action shall be brought, and any creditor may

In

Southwestern Coal Co. v. *McBride*, 185 U. S. 499, 503 (1901),

Mr. Justice White, in delivering the opinion of the court, adopted the following language from the decision of the lower court:

> "The function of the legislature is to prescribe rules to operate upon the actions and rights of citizens in the future. While, in the absence of a constitutional inhibition, the legislature may give to some of its acts a retrospective operation, the intention to do so must be clearly expressed, or neces-

---

file his claim in such action and be made party thereto within one year from the completion of the work under said contract, and not later. If the recovery on the bond should be inadequate to pay the amounts found due to all of said creditors, judgment shall be given to each creditor pro rata of the amount of the recovery. The surety on said bond may pay into court, for distribution among said claimants and creditors, the full amount of the surety's liability, to wit, the penalty named in the bond, less any amount which said surety may have had to pay to the United States by reason of the execution of said bond, and upon so doing the surety will be relieved from further liability: *Provided further*, that in all suits instituted under the provisions of this Act such personal notice of the pendency of such suits, informing them of their right to intervene as the court may order, shall be given to all known creditors, and in addition thereto notice of publication in some newspaper of general circulation published in the state or town where the contract is being performed, for at least three successive weeks, the last publication to be at least three months before the time limited therefor. 10 Federal Stat. Annotated p. 343.

> sarily implied from what is expressed; and, assuming the legislature to possess the power, its act will not be construed to impair or destroy a vested right under a valid contract unless it is so framed as to preclude any other interpretation."

In

The United States v. *American Sugar Co.*, 202 U. S. 563, 577 (1906),

Mr. Justice McKenna says:

> "And in reply we are to remember there is a presumption against retrospective operation, and we have said that words in a statute ought not to have such operation 'unless they are so clear, strong and imperative, that no other meaning can be annexed to them, or unless the intention of the legislator cannot be otherwise satisfied.'"

The same doctrine has been applied in Massachusetts to cases of a remedial character. Thus in

Pierce v. *Cabot*, 159 Mass. 202,

an amendment to a statute relating to the filing of a statement in proceedings to enfore a mechanic's lien was held not to apply to statements filed before the statute went into effect.

In the case of

Shallow v. *Salem*, 136 Mass. 136 (1883),

the notice given to a city of a claim for damages through negligence was held to be insufficient in its description of the place of injury. After the suit had been brought, the law with reference to notice was changed. This amendment, if applicable, would have cured the defect complained of. The amendment was held not to apply. Devens, J., says (page 138):

> "That certain statutes retrospective in their operation may be passed, when of a remedial character, is not controverted; but the general rule applicable to all statutes is that they are to have a prospective operation only, unless it is otherwise distinctly expressed in them, or clearly implied from the necessity of thus giving effect to their provisions."

In the recent Illinois case of

> *Eddy* v. *Morgan*, 216 Ill. 437; 75 N. E. 174 (1905),

the court says (p. 178):

> "But the rule of liberal construction is never carried to the extent of giving the act retrospective effect unless there is something in the act itself which indicates the intention to do so; as where the imperfection of the language used and literal construction might defeat the intention expressed."

See also

> *Auditor Gen.* v. *Chandler*, 108 Mich. 569,
> *Bedier* v. *Fuller*, 116 Mich. 126.

Applying the principles set forth in the foregoing authorities to a construction of the amended act, it becomes apparent that it is not susceptible of a retroactive construction so as to apply to cases already pending under the original act.

The changes made by the amended act are radical and sweeping. The amended act was designed to meet the many defects that had been pointed out in the original act by the judicial decisions thereon. These amendments apply to both procedure and substance. The more important of these amendments are as follows:

1. The United States shall first bring suit upon the bond and claimants shall have the right to intervene in such action.

2. Claims due to the United States shall have priority.

3. If the United States does not bring suit within six months from the completion and final settlement of the contract, then the claimant can procure a copy of the bond and sue thereon.

4. The claimant shall have a right of action and shall be authorized to bring suit in the name of the United States in the Circuit Court of the United States in the district in which said contract was to be performed and executed, and not elsewhere *irrespective of the amount in controversy in such suit* . . . [Italics ours.]

5. Actions on such bonds by claimants must be commenced within one year after the performance and final settlement of the contract.

6. Provision is made for only one action and for intervention in such action by other claimants; and also for payment into court by the surety of the maximum amount of its liability and for relief thereupon from further liability.

The amended act provides for an entirely new system of procedure which could not have been intended to apply to causes of action already pending, and in the clause providing for notice, it expressly states that "in all suits instituted under the provisions of this act, &c.", showing that it was intended to act prospectively only. It also provides that only one suit shall be brought on any one bond. Thirteen other cases are pending in the Circuit Court for the District of Rhode Island, awaiting the

decision of this court in the case at bar. Would it be said that so far as these cases grow out of the same contract, there would be need of consolidation so as to make them conform to the requirements of the amended act? Such a construction of the law would result in a condition of "confusion worse confounded" and it is impossible to contemplate that Congress ever intended it. It also introduces a new feature, viz., priority of any claim due to the United States over the claims of other claimants. The effect of giving a retrospective construction to the amended act might very well be in certain cases to deprive claimants of the vested right to share equally with the United States in the marshaling of assets. See in this connection

United States v. *Bryan*, 9 Cranch, 374,

where a statute giving the United States priority over other claimants was held not to apply to an indebtedness accruing to the United States before the passage of the act.

The amended act is expressed in the future tense. The language is that "hereafter any person, &c." "shall have the right to intervene." "If no suit should be brought by the United States . . . then the person supplying, &c., shall, &c." This form of expression as was said by Mr. Justice McKenna, in

United States v. *American Sugar Co.*, 202 U. S. 563, 578,

"must be given weight."

The provision giving jurisdiction to the Circuit Court, irrespective of the amount involved, is a part of the general scheme of the act, and clearly applies to bonds given after the approval of the act. It is impracticable,

if not impossible to separate it from the other provisions of the act and to hold that as affecting procedure it applies to pending suits.

B

The rules of construction above set forth apply to Amendatory Acts.

The act under consideration is an amendment of a prior act. It provides that the original act "is hereby amended so as to read as follows, &c.," and then the original act is copied with the changes intended to be made. The same rules of construction to determine whether the provisions of a statute are prospective or retrospective apply in the case of an act amended in this form as in other cases of statutory construction. In the case of

Ely v. *Holton*, 15 N. Y. 595,

the Court of Appeals of New York had this question under consideration and in a remarkably strong and lucid opinion, the principles of construction applying to an amendment in the form of "so as to read as follows," is thoroughly considered by Chief Justice Denio. He says (p. 597):

> "The original section and the amended section both commence by conferring upon this court the exclusive jurisdiction to review, upon appeal, 'every actual determination hereafter made at a general term,' &c. It is contended, by the counsel who seek to maintain these appeals, that the amended section should be considered as though it had been

originally enacted several years ago, in the same language which it now contains. If this were so there can be no doubt but that both the appeals should be sustained, as both the determinations appealed from were undeniably made long after the first enactment of that section. But we think this is not the true construction. . .

"The portions of the amended sections, which are merely copied without change, are not to be considered as repealed and again enacted, but to have been the law all along; and the new parts or the changed portions, are not to be taken to have been the law at any time prior to the passage of the amended act. The rule contended for would lead to the grossest absurdities. Proceedings which were quite regular when taken would be made irregular or void by force of the subsequent statute; and confusion of every kind would be introduced. . ."

See also

Sutherland, Statutory Construction, 2d. Ed. § 237.

"The amendment operates to repeal all of the section amended not embraced in the amended form. The portions of the amended sections which are merely copied without change are not to be considered as repealed and again enacted, but to have been the law all along; and the new parts or the changed portions are not to be taken to have been the law at any time prior to the passage of the amended act. The change takes effect prospectively according to the general rule."

See also

Endlich on the Interpretation of Statutes, § 196,

Sedgwick on the Construction of Statutory and Constitutional Law, 2d. Ed. p. 162, (note).

The case of

Ely v. *Holton*, 15 N. Y. 595,

has been cited with approval in a number of cases in New York and also by the leading text writers on the subject of the construction of statutes, and it is submitted that it lays down a reasonable and logical rule.

See

McEwen v. *Den, Lessee*, 24 How. 242, 244,

where the general rule of construction is applied to an amended act without discussion.

C

THE AMENDED ACT IS IN NO SENSE A DECLARATORY ACT.

There is no language in the amended act which would support the contention that it is a declaratory act. But even if it is construed as a declaratory act, it can have no effect on the original act so far as it applies to a case already pending, for the power to interpret and construe statutes rests with the courts and not with the legislature. As was said by Chief Justice Kent in the case of

Dash v. *Van Kleeck*, 7 Johns. 477, 508:

> "It is equally inadmissible to consider the act as declaring how the former statutes were to be construed, as to cases already existing. If this interpretation was to be considered as giving the former acts a new meaning, it then becomes a new rule, and is to have the same effect as any other newly created statute. But if it be considered as an expo-

> sition of the former acts for the information and government of the courts in the decision of causes before them, it would then be taking cognizance of a judicial question. This could not possibly have been the meaning of the act, for the power that makes is not the power to construe a law. It is a well settled axiom that the union of these two powers is tyranny."

In

Koshkonong v. *Burton*, 104 U. S. 668, 678 (1881), there was an act which purported to construe a former act. Mr. Justice Harlan, in speaking for the court, said:

> "By the first section of the act of 1868, the legislature assumed to declare what was the true intent and meaning of the previous legislation prescribing and limiting the rate of interest. It was said by Chancellor Walworth, in *Salters* v. *Tobias*, (3 Paige, (N. Y.) 338, 344.) . . . That . . . Courts will treat such laws with all the respect that is due to them as an expression of the opinion of the individual members of the legislature as to what the rule of law previously was. But beyond that they can have no binding effect; and if the judge is satisfied the legislative construction is wrong, he is bound to disregard it."

The same idea is tersely put by Marshall, C. J., in

Postmaster General v. *Early*, 12 Wheat. 136,148, in this language: "A mistaken opinion of the legislature concerning the law, does not make law."

See also

> Sedgwick on the Construction of Statutory and Constitutional Law, 2d. Ed. p. 214.

In conclusion, we contend that the amended act is

intended to apply only to bonds given after it went into effect. This conclusion is based upon the language of the act. A new system of procedure upon bonds of this class is enacted and the rights of parties under such bonds are materially changed from the original act. The United States is made a preferred claimant as to any claims it may have. The changes, therefore, relate not only to procedure but to matters of substantive right. It is impossible to separate the two and whatever the rule may be as to remedial statutes, the amended act must be held subject to the general rule laid down by this court in construing a statute as to its retrospective or prospective effect. Upon all the considerations, and in view of the language of the act, the amended act is neither retrospective nor declaratory; it applies only to future cases, and the case at bar having arisen and been begun under the original act, the amended act does not in any way affect the decision of this court therein.

V.

The judgment of the Circuit Court of the United States for the District of Rhode Island should be reversed.

Respectfully submitted,

SEEBER EDWARDS,
GEORGE S. COOPER,
JAMES E. SMITH,
Attorneys for the Plaintiff in Error.

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Attorneys for the Plaintiff in Error.

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Supreme Court of the United States

OCTOBER TERM, 1906

No. 173

The United States Fidelity and Guaranty Company,

Plaintiff in Error

vs.

The United States of America Suing for the benefit of James S. Kenyon

Doing business as Burrows & Kenyon

Brief for Defendant in Error on the Question of the Jurisdiction of the Circuit Court of the first circuit in the above entitled action.

EDWARD D. BASSETT
Attorney for Defendant in Error

PROVIDENCE
E. A. JOHNSON & CO. PRINTERS
1907

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1906.

No. 173

THE UNITED STATES FIDELITY AND GUARANTY COMPANY,

PLAINTIFF IN ERROR,

vs.

THE UNITED STATES OF AMERICA,

SUING FOR THE BENEFIT OF JAMES S. KENYON, DOING BUSINESS AS BURROWS & KENYON.

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SUING FOR THE BENEFIT OF JAMES S. KENYON, DOING BUSINESS AS BURROWS & KENYON.

Brief for Defendant in Error

STATEMENT OF THE CASE.

A. The Action.

This is a writ of error to the Circuit Court of the United States for the District of Rhode Island.

The plaintiff in error seeks to review the decision of the Circuit Court of the District of Rhode Island, wherein it denied the defendant's (now plaintiff in error) motion to dismiss the suit of United States of America,

Plaintiff vs. Joseph J. Churchyard and the United States Fidelity and Guaranty Company, Defendants, Law 2713, for want of jurisdiction.

The action below was a suit upon a bond given to the United States of America by a contractor under the provisions of the Act of Congress of August 13, 1894, Chapter 280, Sec. 1, 28 Stat. 278, entitled "An Act for the Protection of Persons Furnishing Material and Labor for the Construction of Public Works" and the amount involved in the controversy is less than two thousand dollars. The suit was one of seventeen actions brought against one Churchyard, a government contractor, for certain work upon various fortifications in Narragansett Bay and against the sureties upon his bonds.

B. Question at Issue.

The question raised and certified to this Court as appears by the Transcript of Record, page 10, is:

Does the Circuit Court of the United States have jurisdiction to entertain an action in the name of the United States for the use and benefit of a person supplying labor and materials for public buildings or work upon a certified copy of a bond given under the provisions of the Act of Congress of August 13, 1894, Chapter 280, Sec. 1, 28 Stat. 278, entitled, "An Act for the Protection of Persons Furnishing Material and Labor for the Construction of Public Works," wherein the amount involved is less than two thousand dollars?

C. The United States statutes involved in this question.

The statute under which this action was brought was the Act of August 13, 1894, Ch. 280 (28 St. 278), entitled "An Act for the protection of persons furnishing materials and labor for the construction of public works," which provides:

> "That hereafter any person or persons entering into a formal contract with the United States for the construction of any public building, or the prosecution and completion of any public work or for repairs upon any public building or public work, shall be required before commencing such work to execute the usual penal bond, with good and sufficient sureties, with the additional obligations that such contractor or contractors shall promptly make payments to all persons supplying him or them labor and materials in the prosecution of the work provided for in such contract; and any person or persons making application therefor, and furnishing affidavit to the Department under the direction of which said work is being, or has been, prosecuted, that labor or materials for the prosecution of such work has been supplied by him or them, and payment for which has not been made, shall be furnished with a certified copy of said contract and bond, upon which said person or persons supplying such labor and materials shall have a right of action, and shall be authorized to bring suit in the name of the United States for his or their use and benefit against said contractor and sureties and to prosecute the same to final judgment and execution: *Provided*, That such action and its prosecutions shall involve the United States in no expense.

> "Sec. 2. Provided that in such case the court in which such action is brought is authorized to require proper security for costs in case judgment is for the defendant."

Two other statutes tend to throw light upon the interpretation the above statute should receive; for convenience they are inserted here, these are

(1) THE ACT OF AUGUST 13, 1894, CHAP. 282 (28 STAT. 279), ENTITLED "AN ACT RELATIVE TO RECOGNIZANCES, STIPULATIONS, BONDS AND UNDERTAKINGS AND TO ALLOW CERTAIN CORPORATIONS TO BE ACCEPTED AS SURETY THEREON," PROVIDED—

> "Sec. 5. That any surety company doing business under the provisions of this Act may be sued in respect thereof in any court of the United States which has now or hereafter may have jurisdiction of actions or suits upon such recognizance, stipulation, bond or undertaking in the district in which such recognizance, stipulation, bond or undertaking was made or guaranteed or in the district in which the principal office of such company is located."

(2) THE ACT OF FEBRUARY 24, 1905, 33 STAT. AT L. 811, CHAP. 778, WHICH AMENDS CHAP. 280, *Supra*, AND THE MATERIAL PORTIONS OF WHICH READ AS FOLLOWS:

> "That hereafter any person or persons entering into a formal contract with the United States for the construction of any public building, or the prosecution and completion of any public work, or for repairs upon any public building or public work, shall be required, before commencing such work, to execute the usual penal bond, with good and suffi-

cient sureties, with the additional obligation that such contractor or contractors shall promptly make payments to all persons supplying him or them with labor and materials in the prosecution of the work provided for in such contract; AND ANY PERSON, COMPANY, OR CORPORATION WHO HAS FURNISHED LABOR OR MATERIALS USED IN THE CONSTRUCTION OR REPAIR OF ANY PUBLIC BUILDING OR PUBLIC WORK, AND PAYMENT FOR WHICH HAS NOT BEEN MADE, SHALL HAVE THE RIGHT TO INTERVENE AND BE MADE A PARTY TO ANY ACTION INSTITUTED BY THE UNITED STATES ON THE BOND OF THE CONTRACTOR, AND TO HAVE THEIR RIGHTS AND CLAIMS ADJUDICATED IN SUCH ACTION AND JUDGMENT RENDERED THEREON, SUBJECT, HOWEVER, TO THE PRIORITY OF THE CLAIM AND JUDGMENT OF THE UNITED STATES. IF THE FULL AMOUNT OF THE LIABILITY OF THE SURETY ON SAID BOND IS SUFFICIENT TO PAY THE FULL AMOUNT OF SAID CLAIMS AND DEMANDS, THEN, AFTER PAYING THE FULL AMOUNT DUE TO THE UNITED STATES, THE REMAINDER SHALL BE DISTRIBUTED PRO RATA AMONG SAID INTERVENERS. IF NO SUIT SHOULD BE BROUGHT BY THE UNITED STATES WITHIN SIX MONTHS FROM THE COMPLETION AND FINAL SETTLEMENT OF SAID CONTRACT, THEN THE PERSON OR PERSONS SUPPLYING THE CONTRACTOR WITH LABOR AND MATERIALS * * * * * SHALL HAVE A RIGHT OF ACTION AND SHALL BE AND ARE HEREBY AUTHORIZED TO BRING SUIT IN THE NAME OF THE UNITED STATES IN THE CIRCUIT COURT OF THE UNITED STATES IN THE DISTRICT IN WHICH SAID CONTRACT WAS TO BE PERFORMED AND EXECUTED, IRRESPECTIVE OF THE AMOUNT IN CONTROVERSY IN SUCH SUIT, AND NOT ELSEWHERE, FOR HIS OR THEIR USE AND BENEFIT, AGAINST SAID CONTRACTOR AND HIS SURETIES, AND TO PROSECUTE THE SAME TO FINAL JUDGMENT AND EXECUTION: PROVIDED, THAT WHERE SUIT IS INSTITUTED BY ANY OF SUCH CREDITORS ON THE BOND OF THE CONTRACTOR IT SHALL NOT BE COMMENCED UNTIL AFTER THE COMPLETE PERFORMANCE OF SAID CON-

TRACT AND FINAL SETTLEMENT THEREOF; AND SHALL BE COMMENCED WITHIN ONE YEAR AFTER THE PERFORMANCE AND FINAL SETTLEMENT OF SAID CONTRACT AND NOT LATER."

(Small capitals ours, showing how the amended chapter differs from the original.)

D. Bond in Controversy.

KNOW ALL MEN BY THESE PRESENTS, That we, Joseph J. Churchyard of Buffalo in the County of Erie State of New York, as principal, and The United States Fidelity and Guaranty Company, a corporation existing under the laws of the State of Maryland, as surety, are held and bound unto the UNITED STATES OF AMERICA in the penal sum of Five Hundred Dollars ($500.00), to the payment of which sum well and truly to be made, we bind ourselves, our heirs, executors, administrators, and successors, jointly and severally, firmly by these presents.

THE CONDITION OF THIS OBLIGATION IS SUCH, That whereas the above bounden Joseph J. Churchyard has, on the Twenty-ninth day of June, 1899, entered into a contract with the United States, represented by 1st Lieut. E. W. Hubbard, 7th Artillery Quartermaster for The Construction at Fort Greble, R. I., One Non-Com. Office_'s Quarters.

NOW, THEREFORE, If the above-bounden Joseph J. Churchyard, his heirs, executors, or administrators, shall and will, in all respects, duly and fully observe and per-

form all and singular the covenants, conditions, and agreements in and by the said contract agreed and covenanted by said Joseph J. Churchyard to be observed and performed according to the true intent and meaning of the said contract, and as well during any period of extension of said contract that may be granted on the part of the United States as during the original term of the same, and shall promptly make full payments to all persons supplying him labor or materials in the prosecution of the work provided for in said contract, then the above obligation shall be void and of no effect; otherwise, to remain in full force and virtue.

IN WITNESS WHEREOF, The parties hereto have executed this instrument this ninth day of August, 1899; the name and corporate seal of said surety being hereto affixed and these presents duly signed by its attorney-in-fact, pursuant to a resolution of its Board of Directors, passed on the ninth day of January, 1899, a copy of the record of which is on file in the War Department.

In presence of

Kate Knempel as to Joseph J. Churchyard (Seal)

Attest:

James Ryan The United States Fidelity and
Attorney-in-fact Guaranty Company,

By Vincent D. Ryan, (Seal)
Attorney-in-fact.

POINTS OF LAW.

The United States Circuit Court has jurisdiction to entertain the actions provided by the Act of Congress of August 13,1894, Chap. 280, Sec. 1 (28 Stat. 278) and Chap. 282, Sec. 1 (28 Stat. 278) and Chap. 282 (28 Stat. 279), for

I. THE UNITED STATES IS A REAL, NOT A NOMINAL, PARTY TO THE ACTION ON THE CONTRACTOR'S BOND.

II. JURISDICTION OF THE UNITED STATES COURTS HAS BEEN SUSTAINED IN ANALAGOUS CASES WHERE THE UNITED STATES PERMITS PARTIES WHERE BONDS ARE TAKEN IN THE NAME OF THE UNITED STATES TO BRING SUIT UPON THEM.

III. THE REASONING OF THE COURT IN CASES OF SIMILAR NATURE IN THE FIRST CIRCUIT WHERE JURISDICTION HAS BEEN ENTERTAINED IS CLEARER AND MORE CONVINCING THAN THE REASONING OF THE ADVERSE DECISIONS IN THE SIXTH, SEVENTH AND NINTH CIRCUITS.

I.

The United States is a real, not a nominal, party to the action on the contractor's bond.

A. THE HISTORY OF THE STATUTE AND KINDRED ENACTMENTS PASSED THE SAME DAY SHOW THAT THE UNITED STATES HAS A REAL INTEREST IN THE BOND.

(1) IT WAS THE INTENTION OF CONGRESS WHEN THIS ACT WAS PASSED TO AID THE UNITED STATES IN PROSECUTING PUBLIC WORKS, FOR BY THE TERMS OF THE ACT A MATERIAL MAN WAS IN NO DANGER OF LOSING HIS MONEY; HENCE, WOULD FURNISH MATERIALS AND LABOR PROMPTLY.

a. The act was passed on August 13, 1894, and it provides that "the contractor shall execute the *usual* penal bond * * * * * with the additional obligations that such contractor or contractors shall promptly make payments to all persons supplying him or them labor and materials," etc., and provides further that upon breach being duly proven such person shall be authorized to bring suit in the name of the United States for his or their use against said contractor and sureties, and to prosecute the same to final judgment and execution.

The learned judge of the court below very properly said: Par. 23, p. 13, Transcript of Testimony) "It was the apparent intent of Congress to work out the protection of material men and laborers through a contract between the United States and the contractor. In determining the intent of Congress we should look rather to the particular pecuniary interest of the United States in the special case before us. It is apparent that the actions provided for by act embrace both those that may

pecuniarily affect the United States and those that may not * * * * * * * When Congress to work out a specific purpose requires a contract with the United States and authorizes a suit on that contract, we are not at liberty to say that this mode of effecting the object is all unreal, nominal and unsubstantial. Even if the form established for working out the purpose was somewhat fictional in character, we should hesitate to destroy the statutory machinery if we would thereby practically frustrate the purpose of the act or impair its value."

Even the learned judge in United States *vs.* Sheridan, 119 Fed. 236, page 239, in writing an adverse opinion on this question says: "It is true that the act of August 13, 1894, was enacted for beneficial purposes, and possibly those benefits to a certain extent may extend to the United States in making more certain and prompt the obtaining of materials and labor by contractors on public works who have given the bond with surety upon which outside parties can rely."

(2) THERE WAS A GENERAL SCHEME PROVIDING FOR THE IMPROVEMENT AND ADVANCEMENT OF PUBLIC WORK AS IS SHOWN BY SIMILAR LEGISLATION PASSED THE SAME DAY.

a. Chapter 282, (28 Stat. 279) enacted August 13, 1894, provides when and under what conditions surety companies shall be allowed to become surety upon bonds required by virtue of Chapter 280 (28 Stat. 278). It also provides where and in what courts said bonds shall be sued, i. e., in the Courts of the United States.

See Sec. 5, Chapter 282, supra.

These two chapters undoubtedly, when taken together show that they were part of a general scheme for the providing of bonds, surety, etc., and the enforcement of rights in relation thereto, and that the United States has a real interest in the successful enforcement of this legislation.

(3) IT MUST ALSO HAVE BEEN THE INTENT OF CONGRESS THAT THE ACTION PROVIDED FOR IN THE ACT SHOULD BE BROUGHT IN THE COURTS OF THE UNITED STATES.

a. The act (Chap. 280, Aug. 13, 1894) expressly makes the United States the legal plaintiff.

In suits at law the *legal* interest alone is regarded in testing the jurisdiction of the United States Courts.

Colson vs. *Lewis*, 2 Wheat. 377.
Irvine vs. *Lowry*, 14 Peters, 293.
Dodge vs. *Tulley*, 144 U. S. 451.

b. The provisions allowing suits to be brought on certified copies of contract bonds and for security for costs, etc., should be applicable only to courts subject to congressional legislation.

c. The rights of the material man arising by virtue of an act of Congress can only be enforced in the Courts of the United States.

Martin vs. *Hunter*, 1 Wheat. 330.
Ellis vs. *Norton*, 16 Fed. 4.
United States vs. *Lathrop*, 17 Johns. 3.
New Orleans etc., vs. *Miss.*, 102 U. S., 135.
Bock vs. *Perkins*, 139 U. S. 621.

d. The United States might at any time wish to intervene in suits of this kind, (as in fact it did intervene in the case of *American Surety Co.* vs. *Lawrenceville Cement Co.*, 96 Fed. 25) which it could do only in the Courts of the United States. In that case the United States would sue in one court and the material man would be obliged to sue in a state court; thus proper adjustment of the equities could not be accomplished.

e. The fact that Congress by Act of Feb. 24, 1905, 33 Stat. at L. 811 Chap. 778 has amended Chap. 280 so as to read that the suit should be brought in the Circuit Court of United States must be given great weight in determining its intention. *United States for use of Hill* vs. *American Surety Co.*, 200 U. S. 197.

B. THE UNITED STATES HAS A REAL, NOT MERELY A NOMINAL, INTEREST IN THE BOND, AND THE UNITED STATES HAVING OBTAINED THE BENEFIT OF MATERIAL FURNISHED AND PROMPT SERVICE, PERMITS PARTIES TO BE SUBROGATED TO ITS RIGHTS.

(1.) THIS INTEREST IS TWO-FOLD:

(a.) A direct pecuniary interest.

(b.) An interest as a constructor of public works to protect those persons who incorporate their labor or material into the works.

In *American Surety Co.* vs. *Lawrenceville Cement Co.*, supra, (96 Fed. 25, 26) Judge Putnam says:

> "The United States, by force of the statute which we have cited, voluntarily makes themselves trustee alike for their own interest and the interest of the individuals intended to be protected; and having thus voluntarily created and accepted a trust, they are barred by equitable principles from asserting for themselves any advantage over other benficiaries."

In *United States* vs. *National Surety Co.*, 34 C. C. A. (a case brought on the bond furnished by virtue of statute under discussion and where the Circuit Court of Appeals, 8th Circuit, took jurisdiction, where the amount involved was only $842.98) Judge Thayer says, p. 529:

> "The bond which is provided for by the act was intended to perform a double function,—in the first place to secure the Government, as before, the faithful performance of all obligations which a contractor might assume towards it, and in the second place, to protect third persons from whom the contractor obtained materials and labor."

This Court, Mr. Justice Day writing the opinion, in *United States* vs. *American Surety Co.*, 200 U. S., 197, in construing the terms of this statute says, at p. 199:

> "The purpose of the law is, as its title declares: 'For the protection of persons furnishing materials and labor for the construction of public works.' If literally construed, the obligation of the bond might be limited to secure only persons supplying labor or materials directly to the contractor, for which he would be personally liable. But we must not overlook, in construing this obligation, the manifest purpose of the statute to require that *material and labor actually contributed to the construction*

of the public building shall be paid for, and to provide a security to that end."

"Statutes are not to be so literally construed as to defeat the purpose of the legislature. 'A thing which is within the intention of the makers of the statute is as much within the statute as if it were within the letter.' *United States* vs. *Freeman*, 3 How. 556, 11 l. Ed. 724, 'The spirit as well as the letter of a statute must be respected, and where the whole context of the law demonstrates a particular intent in the legislature to effect a certain object, some degree of implication may be called in to aid that intent, Chief Justice Marshall, in *Durousseau* vs. *United States*, 6 Cranch, 308, 3 L. Ed. 232.

"Looking to the terms of this statute in its original form, and as amended in 1905, we find the same congressional purpose to require payment for material and labor which have been furnished for the construction of public works. The affidavit to be filed with the head of the department under the direction of which the work has been prosecuted requires the affiant to state that labor or materials for the prosecution of such work has been supplied by him, for which payment has not been made, and such persons are given the right of action on the bond in the name of the United States. Language could hardly be plainer to evidence the intention of Congress to protect those whose labor or material has contributed to the prosecution of the work."

(2) THE UNITED STATES HAS CLEARLY MADE A CONTRACT FOR THE BENEFIT OF THIRD PARTIES AND HAS EXPRESSLY AUTHORIZED SUCH PARTIES AS ARE AGGRIEVED

BY A BREACH OF CONTRACT TO SUE IN THE NAME OF THE UNITED STATES; HENCE THE UNITED STATES MUST BE THE LEGAL PLAINTIFF.

a. The residence of the trustee or legal plaintiff determines the jurisdiction of the Circuit Courts.

Bonafee vs. *Williams*, 3 Howard, 574
Knapp vs. *Troy & Boston R. R. Co.*, 20 Wall. 117
Dodge vs. *Tulleys*, 144 U. S. 451
Coal Co. vs. *Blatchford*, 11 Wall., 172

aa. The plaintiff in error will argue that this action is not a controversy in which the United States is plaintiff or petitioner, but is only a modal party as is shown in the following cases decided by this court.

McNutt vs. *Bland*, 2 Howard, 10
Browne vs. *Strode*, 5 Cranch, 303
Huff vs. *Hutchinson*, 14 Howard, 587
Maryland vs. *Baldwin*, 112 U. S. 490

In each of these cases, which are actions on bonds given to an officer by virtue of some statute for the sole benefit of the persons whom it may concern, the interest of the plaintiff was purely nominal. "They were not trustees and held nothing for the use or benefit of the real parties. They could not, as in said *McNutt* vs. *Bland*, prevent the institution or prosecution of the actions or exercise any control over them." (*Coal Co.* vs. *Blatchford*, *supra*).

bb. In the case at bar, however, the United States has a potential interest, to say the least.

It may wish to intervene in the action, as it did in the case of the *American Surety Co.* vs. *Lawrenceville Cement Co., supra.*

It might wish to participate as a creditor in the distribution of assets, it might wish to institute a suit on its own behalf for a breach of the conditions, as the bond is to protect itself as well as the material men, it has an interest "as an insurer of persons in whose protection it has an interest analagous, perhaps, to that which it has in a suit to cancel a patent for lands or for an invention, not because of any benefit to itself, but because of an obligation to the public or individuals." (Judge Brown's opinion.) 132 Fed. p. 88.

It is aggrieved by the failure of Churchyard to pay for the work and materials furnished in the construction of the non-commissioned officers quarters at Fort Greble, R. I. (see conditions in bond).

b. Where the United States is plaintiff in an action, the Circuit Court has jurisdiction without regard to the value of the matter in dispute.

United States vs. *Sayward*, 160 U. S. 493
United States vs. *Reid*, 90 Fed. 522

c. Even if the statute had not expressly given the right to sue on the contractor's bond, a material man injured by a breach could have sued in the name of the United States as irrevocable trustees for the injured party.

Stephenson, et al. vs. *Monmouth, Minn. and Mfg. Co.*, 28 C. C. A. 292, 54 U. S. App. 499

In this case, Lurton, J., speaking on the question of trusteeship where a bond is taken by a city securing the payment of materials furnished and labor performed in construction of a public improvement, says on page 295 (28 C. C. A.): "So far as the bond is for the protection of the city it may *deal with it as it chooses; but so far as it is for the benefit of third persons it is a mere trustee* and could do nothing which would legally discharge the bond or affect the interest of the beneficiaries."

For other cases supporting this principle that the obligee of bond given pursuant to a statute for the protection of labor and material men is a mere trustee, see:

Horn vs. *Whittier*, 6 N. H. 88, *94*
Devers vs. *Howard*, 144 Mo. 671
Sample vs. *Hale*, 34 Neb. 220, 225, 226
Baker vs. *Bryan*, 64 Ia. 562

In this case (*Baker* vs. *Bryan*, *supra*) which was an action brought on a contractor's bond furnished a School District by virtue of statute and which provided that contractor shall "pay all claims for material and labor it used in the construction of said building," the Court has this to say regarding the interest of the School District in the faithful performance of the conditions of the bond, in allowing a material man to sue on the bond in his own name (p. 565, 566):

> "That the sub-contractors, knowing that they were secured, would do better work and furnish better material than if they felt certain about their pay, cannot be doubted. And it is equally certain that the credit which the contractor would gain by the security would enable him to prosecute the

work more rapidly and with greater hope of profit. These things, it may readily be seen, would result in great benefit to the District."

It seems to us that the same reasoning is applicable with equal force to the interest of the United States in the case at bar.

II.

Jurisdiction of the United States Courts has been sustained in analogous cases where the United States permits parties where bonds are taken in the name of the United States to bring suit upon them.

A. MARSHAL'S BONDS.

Sec. 784 Revised Statutes provide:

"In case of a breach of the conditions of a marshal's bond, any person thereby injured may institute in his own name and for his sole use, a suit on said bond and thereupon shall recover such damages as shall be legally assessed with costs of suit, for which execution may issue for him in due form. If such party fails to recover in the suit, judgment shall be rendered and execution may issue against him for costs in favor of the defendant, the United States in no case shall be liable for the same."

(1) IT IS WELL SETTLED THAT SUITS BROUGHT IN PURSUANCE OF THIS SECTION AND ITS AMENDMENTS CAN BE MAINTAINED IN THE COURTS OF THE UNITED STATES. IN FACT, THE FEDERAL COURTS MUST NECESSARILY HAVE JURISDICTION

IN SUCH SUITS BECAUSE THE CASE DEPENDS UPON THE SCOPE AND EFFECT OF THAT BOND AND MEANING OF THE STATUTES OF THE UNITED STATES.

Adler vs. *Newcombe*, 2 Dill, 45
United States vs. *Davidson*, 1 Biss. 433
Bock vs. *Perkins*, 139 U. S. 628
Howard vs. *United States, etc.*, 184 U. S. 676, *681*, affirming *Bock* vs. *Perkins*

In *Bock* vs. *Perkins. supra*, this Court says:

> "A case, therefore, depending upon the inquiry whether the marshal or his deputy has rightfully executed a lawful precept directed to the former from a Court of the United States, is one arising under the laws of the United States, for as this Court has said, 'cases arising under the laws of the United States are such as grow out of the legislation of Congress, whether they constitute the right or privilege, or claim or protection, or defense of the party in whole or in part by whom they are asserted.'"

B. BOND OF CLERK OF A COURT.

(1) A SUIT ON BOND GIVEN IN ACCORDANCE WITH THE JUDICIARY ACT OF 1879 AND ITS AMENDMENT BY ACT OF FEBRUARY 22d, 1875, (18 STAT. 333, CHAP. 95) BY A CLERK OF A COURT CONDITIONED THAT HE IS "FAITHFULLY TO DISCHARGE THE DUTIES OF HIS OFFICE AND SEASONABLY TO RECORD THE DECREES, JUDGMENTS, AND DETERMINATIONS OF THE COURT OF WHICH HE IS CLERK" IS HELD TO BE WITHIN THE JURISDICTION OF THE CIRCUIT COURT WITHOUT A DIVERSITY OF CITIZENSHIP.

Howard vs. *United States*, 184 U. S. 676.

The reasoning of the court on page 681 in showing cause why the federal courts had jurisdiction independently of a citizenship question, applies with equal force to jurisdiction of suit in the case at bar. "The suit was directly upon a bond taken by the Circuit Court in conformity with the statutes of the United States and the case depends upon the *scope and effect of that bond and the meaning of those statutes.* It was therefore a suit arising under the laws of the United States.

III.

The reasoning of the Court in cases of similar nature in the first circuit where jurisdiction has been entertained is clearer and more convincing than the reasoning of the adverse decisions in the sixth, seventh and ninth circuits.

A. THE FIRST CIRCUIT DECISIONS.

An action on the bond of a contractor furnished under the provisions of the Act of Congress, August 13, 1894, Chap. 280, has been entertained in the following cases:

American Surety Co. vs. *Lawrenceville Cement Co.*, 96 Fed. 25; 110 Fed. 718 and 913
United States vs. *O'Brien*, 120 Fed. 447
United States vs. *Churchyard, et al.*, 132 Fed. 82

In these cases the reasoning of the court in sustaining jurisdiction is:

(1) THAT THE UNITED STATES HAS A REAL INTEREST IN THE BONDS IN QUESTION AND SUITS THEREON.

(2) THE UNITED STATES, BY VIRTUE OF THE STATUTE HAS MADE A CONTRACT FOR THE BENEFIT OF THE MATERIAL MEN; A CONTRACT FROM WHICH IT HAS DERIVED GREAT MATERIAL BENEFIT, THEREFORE, IT IS A TRUSTEE BOTH FOR ITS OWN INTEREST AND THE INTEREST OF THE INDIVIDUALS INTENDED TO BE PROTECTED.

(3) THAT THE PURPOSE OF CONGRESS SHOULD NOT BE FRUSTRATED AND THE ACT RENDERED VALUELESS BY A CONSTRUCTION THAT PRACTICALLY REMOVES ALL THE BENEFITS INTENDED BY THE ACT.

(4) THAT THE UNITED STATES IS THE LEGAL PLAINTIFF BY THE VERY TERMS OF THE STATUTE, AND THEREFORE, THAT AN ACTION BROUGHT UNDER THE PROVISIONS OF THE ACT IS SUIT WHEREIN THE UNITED STATES IS A PARTY PLAINTIFF OR PETITIONER; HENCE, IS PROPERLY WITHIN THE JURISDICTION OF THE UNITED STATES COURTS.

B. THE DECISIONS IN THE SIXTH, SEVENTH AND NINTH CIRCUITS.

Jurisdiction of the United States Courts in suits of similar nature has been denied in the following cases:

United States vs. *Henderlong*, 102 Fed. 2, 6th Circuit.

United States vs. *Sheridan*, 109 Fed. 236, 7th Circuit.

United States vs. *Barrett*, 135 Fed. 189, 9th Circuit.

The decision of all three cases is based upon the following grounds:

(1) THE UNITED STATES HAS NO INTEREST DIRECTLY OR INDIRECTLY IN THE CONTROVERSY.

(2) THE UNITED STATES IS SIMPLY A FORMAL OR MODAL PARTY; HENCE, IS NOT A PARTY PLAINTIFF WITHIN THE MEANING OF THE JUDICIARY ACT OF MARCH 3, 1887.

C. THE REASONINGS COMPARED.

It seems that the opinion of the learned judges of the Sixth, Seventh and Ninth Circuits wholly ignore the real interest of the United States in these actions. The opinion of Judge Baker in *United States* vs. *Henderlong*, *supra* (p. 4) says:

> "The United States has no interest either *directly* or *indirectly* in the controversy, nor can they be liable for costs."

This does not take into consideration the vital interests of the United States in these actions on the bonds, for:

(1) THE UNITED STATES AS A CREDITOR MAY BE INTERESTED IN THE DISTRIBUTION PRO RATA AMONG THE CREDITORS WHICH COULD BE ORDERED IN THESE SUITS.

United States vs. *American Surety Co. of New York.*, 135 Fed, 78

American Surety Co. vs. *United States*, 59 C. C. A. 256

United States vs. *Heaton*, 63 C. C. A. 156

(2) THE UNITED STATES MAY INTERVENE IN THESE ACTIONS.

American Surety Co. vs. *Lawrenceville Cement Co.*
96 Fed. 25.

(3) THE UNITED STATES AS CONSTRUCTOR OF PUBLIC WORKS IS NECESSARILY BENEFITED BY THE BOND IN QUESTION AND THE RIGHTS IT HAS GIVEN TO CREDITORS OF THE CONTRACTOR.

(See Point I, B (2) c.)

(4) THE UNITED STATES IS THE OBLIGEE NAMED IN THE BOND, AND THAT UNDER THE WELL-SETTLED DOCTRINE AT COMMON LAW AN ACTION ON A BOND UNDER SEAL MUST BE BROUGHT IN THE NAME OF THE OBLIGEE IRRESPECTIVE OF THE OWNER.

(5) THAT THE UNITED STATES HAS BY THE TERMS AND SCOPE OF THE ACT MADE ITSELF A TRUSTEE FOR THE BENEFIT OF THE PERSONS INTENDED TO BE PROTECTED, AND AS SUCH TRUSTEE ARE A NECESSARY PARTY TO THE ACTION.

(See Point I, B (1) and (2).)

(6) THE UNITED STATES IS EXPRESSLY MADE THE LEGAL PLAINTIFF BY THE TERMS OF THE ACT.

Judge Brown, in *United States* vs. *Churchyard & United Fidelity and Guaranty Co.* (p. 16 transcript) very tersely reasons:

> "When Congress, however, with power to confer jurisdiction, expressly declares that the United States shall take a contract upon which persons may sue in the name of the United States, is there any practical danger in saying that Congress meant exactly what it said, and meant it with no further qualification than that expressly stated? I have

before me, as the legal plaintiff, the United States, —a legal cause of action—a contract between the United States and the contractor."

Conclusion.

With reason and authority to support the proposition that the United States has a real and vital interest in the actions provided for by the Act of Congress of August 13, 1894, Chap. 280, Sec. 1, it would seem that there can be no question as to the jurisdiction of the Circuit Court of the First Circuit in the case at bar.

IV.

The jurisdictional question raised in this case should be answered in the affirmative.

Respectfully submitted,

EDWARD D. BASSETT,

Atty. for Defendant in Error.

Supreme Court of the United States.

No. 173.—October Term, 1906.

The United States Fidelity and Guaranty Company, Plaintiff in Error, vs. The United States of America, suing for the benefit of James S. Kenyon, doing business as Burrows & Kenyon.	In error to the Circuit Court of the United States for the District of Rhode Island.

[February 25th 1907.]

Mr. Justice Harlan delivered the opinion of the Court.

By an act of Congress approved August 13th 1894, entitled "An act for the protection of persons furnishing materials and labor for the construction of public works," it was provided: "That hereafter any person or persons entering into a formal contract with the United States for the construction of any public building, or the prosecution and completion of any public work or for repairs upon any public building or public work, shall be required before commencing such work to execute the usual penal bond, with good and sufficient sureties, with the additional obligations that such contractor or contractors shall promptly make payments to all persons supplying him or them labor and materials in the prosecution of the work provided for in such contract; and any person or persons making application therefor, and furnishing affidavit to the Department under the direction of which said work is being, or has been, prosecuted, that labor or materials for the prosecution of such work has been supplied by him or them, and payment for which has not been made, shall be furnished with a certified copy of said contract and bond, upon which said person or persons supplying such labor and materials shall have a right of action, and shall be authorized to bring suit in the name of the United States for his or their use and benefit against said contractor and sureties and to prosecute the same to final judgment and execution: *Provided*, That such action and its prosecutions shall involve the United States in no expense. Sec. 2. Provided that in such case the court in which such action is brought is authorized to require proper security for costs in case judgment is for the defendant." 28 *Stat.* 278, *c.* 280.

On the same day, August 13th 1904, Congress passed an act providing that whenever any recognizance, stipulation, bond or undertaking conditioned for the faithful performance of any duty, or for doing or

refraining from doing anything in such recognizance, stipulation, bond or undertaking specified, is by the laws of the United States required or permitted to be given with one or more sureties, it should be lawful to accept such instrument from a corporation having power to guarantee the fidelity of persons holding positions of public or private trust, and to execute and guarantee bonds and undertakings in judicial proceedings. The act provided that any surety company doing business under the provisions of that act "may be sued in respect thereof in any court of the United States which has now or hereafter may have jurisdiction of actions or suits upon such recognizance, stipulation, bond, or undertaking, in the district in which such recognizance, stipulation, bond, or undertaking was made or guaranteed, or in the district in which the principal office of such company is located." 28 *Stat.* § 5, *c.* 282, *p.* 279.

Proceeding under the above acts the United States, in 1899, made a written contract with one Churchyard to furnish labor, materials, tools and appliances for the construction of a public building, taking from him the required bond with the United States Fidelity and Guaranty Company, a corporation, as surety.

The present action, brought in the Circuit Court on that bond, was by the United States, "suing herein for the benefit and on behalf of James S. Kenyon," who furnished a contractor for use in the construction of the proposed Government building, materials of the value of $66.05, for which the latter neglected and refused to pay. Damages to the amount of $500 were claimed in the declaration.

The defendant, the United States Fidelity and Guaranty Company, pleaded that it did not owe the sum demanded. The plaintiff introduced testimony, but the defendant introduced none and it appearing upon the face of the declaration that the value of the matter in dispute was less than $2,000, he moved that the action be dismissed for want of jurisdiction in the Circuit Court. That motion was denied, and judgment for $206.47 was entered against the Fidelity and Guaranty Company for the use and benefit of Kenyon. *United States* v. *Churchyard*, 132 *Fed. Rep.* 82.

This case is here upon a certificate as to the original jurisdiction of the Circuit Court of the United States of this action.

A Circuit Court of the United States, as provided in the Judiciary Act of 1887–8, may take original cognizance of any suit, at common law or in equity, arising under the laws of the United States, if the value of the matter in dispute exceeds two thousand dollars, exclusive of interest and costs. 25 *Stat.* 433, *c.* 866. But if, within the meaning of that act, the United States is the plaintiff in the action, then jurisdiction exists in a Circuit Court without regard to such value. *United States* v. *Sayward*, 160

U. S. 493; *United States* v. *Shaw*, 39 *Fed. Rep.* 433; *United States* v. *Kentucky River Mills*, 45 *Fed. Rep.* 273; *United States* v. *Reid*, 90 *Fed. Rep.* 522.

The contention of the Fidelity Company is that the Government, in this case, is to be deemed a nominal party only, its name being used as plaintiff simply under the authority of the above act of 1894, *c.* 280. In support of this position our attention is called to the following among other cases: *Browne* v. *Strode*, 5 *Cranch*, 303; *McNutt* v. *Bland*, 2 *How.* 9, 14; *Maryland* v. *Baldwin*, 112 *U. S.* 490; *Stewart* v. *B. & O. R. R. Co.*, 168 *U. S.* 445.

Browne v. *Strode* was a suit in the Circuit Court for the District of Virginia in which the persons named in the declaration as plaintiffs were justices of the peace, all citizens of Virginia. The suit was on a bond given by an executor in conformity with a Virginia statute, and was for the recovery of a debt due from the testator in his lifetime to an alien, a British subject. The defendant was a citizen of Virginia. This court held that the Circuit Court had jurisdiction, notwithstanding the justices and the defendant were all citizens of the same State. This was, we assume, upon the ground that the justices were nominal parties only, while the beneficial party was an alien, and the defendant a citizen of the State in which the suit was brought.

McNutt v. *Bland* was a suit upon a bond given by a Sheriff and running to the Governor of the State, conditioned for the faithful performance of the duties of his office. The statute authorized suit to be brought and prosecuted from time to time at the cost of any party injured until the whole amount of the penalty was recovered. The suit was brought in the name of the Governor for the use of certain parties who were citizens of New York. The court held that the Sheriff and his sureties, citizens of Mississippi, could be sued by the parties in interest in their own name, and that no sound reason could be perceived "for denying the right of prosecuting the same cause of action against the Sheriff and his sureties in the bond, by and in the name of the Governor, who is a purely naked trustee for the party injured. He is a mere conduit through whom the law affords a remedy to the person injured by the acts or omissions of the Sheriff; the Governor cannot prevent the institution or prosecution of the suit, nor has he any control over it. The real and only plaintiffs are the plaintiffs in the execution, who have a legal right to make the bond available for their indemnity, which right could not be contested in a suit in a state court of Mississippi, nor in a Circuit Court of the United States, in any other mode of proceeding than on the Sheriff's bond."

Maryland v. *Baldwin*, 112 *U. S.* 490, 491, was an action in a State court on an administrator's bond in the name of the State for the benefit of one

Markley, a citizen of New Jersey, the obligors in the bond being citizens of Maryland. The action was removed to the Circuit Court of the United States. After referring to the cases of *Browne* v. *Strode* and *McNutt* v. *Bland*, the court said: "The justices of the peace in the one case and the governor in the other were mere conduits through whom the law afforded a remedy to persons aggrieved, who alone constituted the complaining parties. So in the present case the State is a mere nominal party; she could not prevent the institution of the action, nor control the proceedings or the judgment therein. The case must be treated, so far as the jurisdiction of the Circuit Court of the United States is concerned, as though Markley was alone named as plaintiff; and the action was properly removed to that court."

Stewart v. *C. B. & Q. R. R. Co.* was an action against a railroad company by an administrator to recover damages for the benefit of a widow whose husband's death was alleged to have been caused by the negligence of the defendant company. In the course of the discussion of the controlling questions in that case the court observed in passing that "for purposes of jurisdiction in the Federal courts regard is had to the real rather than to the nominal party," and that even in an action of tort "the real party in interest is not the nominal plaintiff but the party for whose benefit the recovery is sought."

This case differs from those just cited and stands, we think, on exceptional grounds. The United States is not here a merely nominal or formal party. It has the legal right, was a principal party to the contract, and, in view of the words of the statute, may be said to have an interest in the performance of all its provisions. It may be that the interests of the Government, as involved in the construction of public works, will be subserved if contractors for such works are able to obtain materials and supplies with certainty and promptly. To that end Congress may have deemed it important to assure those who furnish such materials and supplies that the Government would exert its power directly for their protection. It may well have thought that the Government was under some obligation to guard the interests of those whose labor and materials would go into a public building. Hence, the statute required that, in addition to a penal bond in the usual form, one should be taken that would contain the specific, special obligation directly to the United States that the contractor or contractors "shall promptly make payments to all persons supplying him or them labor and materials in the prosecution of the work." The Government is a real party here because the declaration opens, "The United States, suing herein for the benefit of and on behalf of James Kenyon . . comes and complains," and alleges that the "defendants became and are indebted to the United States for the benefit of the said James S. Kenyon."

In a large sense the suit has for its main object to enforce that provision in the bond that requires prompt payments by the contractor to material men and laborers. The bond is not simply one to secure the faithful performance by the contractor of the duties he owes directly to the Government in relation to the specific work undertaken by him. It contains, as just stated, a special stipulation with the United States that the contractor shall promptly make payments to all persons supplying labor and materials in the prosecution of the work specified in his contract. This part of the bond, as did its main provisions, ran to the United States, and was therefore enforcible by suit in its name. We repeat, the present action may fairly be regarded as one by the United States itself to enforce the specific obligation of the contractor to make prompt payment for labor and materials furnished to him in his work. There is therefore a controversy here between the United States and the contractor in respect of that matter. The action is none the less by the Government as a litigant party, because only one of the persons who supplied labor or materials will get the benefit of the judgment. We are of opinion, in view of the peculiar language of the act of 1894 for the protection as well of the United States as of all persons furnishing materials and labor for the construction of public works, that it is not an unreasonable construction of the words in the Judiciary Act of 1887–8, "or in which controversy the United States are plaintiffs or petitioners," to hold that the United States is a real and not a mere nominal plaintiff in the present action, and therefore that the Circuit Court had jurisdiction.

This interpretation of the statute finds some support in the above act of 1894, c. 282, passed the same day as the act c. 280 for the protection of material men and laborers, and which provides that suits against a fidelity or guaranty corporation, accepted as surety in any recognizance, stipulation, bond or undertaking given to the United States, may be sued in any court of the United States having jurisdiction of suits upon such instrument. There is in that act no express limitation as to the amount involved in suits of that character in either of the acts passed in 1894. Taking the two acts together, there is reason to say that Congress intended to bring all suits, embraced by either act, when brought in the name of the United States, within the original cognizance of the Circuit Courts of the United States, without regard to the amount in dispute. And this view as to the intention of Congress is strengthened by an examination of the act of February 24th 1905, 33 *Stat.* 811, c. 778, which amends the above statute of 1904, c. 280. After providing that persons supplying labor and materials for the construction of a public work shall have the right to intervene in any suit brought by the United States against the contractor, that act declares that if no such suit is brought by the United States within six

months after completion of the contract then the person supplying labor or material to the contractor "shall have a right of action and shall be and are hereby authorized to bring suit in the name of the United States in the Circuit Court of the United States in the district in which said contract was to be performed and executed, *irrespective of the amount in controversy in such suit*, and not elsewhere, for his or their use and benefit, against said contractor and his sureties, and to prosecute the same to final judgment and execution."

It is true that this statute can have no direct application here, because the present action was instituted long prior to its passage and after the trial court had decided the question of the jurisdiction of the Circuit Court. As the act of 1905 does not refer to cases pending at its passage, the question of jurisdiction depends upon the law as it was when the jurisdiction of the Circuit Court was invoked in this action. Nevertheless, that act throws some light on the meaning of the act of 1894, *c.* 280, for the protection of material men and laborers, and tends to sustain the view based on the latter act, namely, that in suits brought in the name of the Government for their benefit the United States is a real litigant, not a mere nominal party, and that of such suits, the Government being plaintiff therein, and having the legal right, the Circuit Court may take original cognizance without regard to the value of the matter in dispute. There are cases which take the opposite view, but the better view we think is the one expressed herein.

The judgment is

Affirmed.

Mr. Justice BREWER dissents.

True copy.

Test:

Clerk Supreme Court, U. S.